2017

Foster v. Chatman: A Missed Opportunity for Batson and the Peremptory Challenge

Nancy S. Marder

CONNECTICUT
LAW REVIEW

VOLUME 49 MAY 2017 NUMBER 4

Article

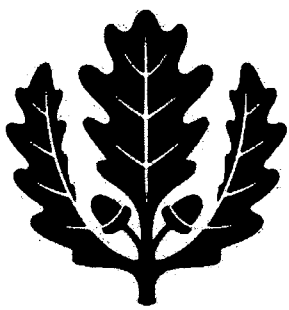
Foster v. Chatman: A Missed Opportunity for *Batson* and the Peremptory Challenge

NANCY S. MARDER

In 2016, the United States Supreme Court decided that the prosecutors in Foster v. Chatman *exercised race-based peremptory challenges in violation of* Batson v. Kentucky. *The Court reached the right result, but missed an important opportunity. The Court should have acknowledged that after thirty years of the* Batson *experiment, it is clear that* Batson *is unable to stop discriminatory peremptory challenges.* Batson *is easy to evade, so discriminatory peremptory challenges persist and the harms from them are significant. The Court could try to strengthen* Batson *in an effort to make it more effective, but in the end the only way to eliminate discriminatory peremptory challenges is to eliminate the peremptory challenge.*

The Court in Foster *undertook a close reading of the prosecutors' reasons and found race to be the basis for the prosecutors' peremptory challenges. This Article identifies the strengths and weaknesses of the Court's opinion in* Foster. *However, Foster's case was unusual because the prosecutors' notes, with their explicit references to African-American prospective jurors' race, were in effect a "smoking gun." Without such notes, the prosecutors' seemingly race-neutral explanations would have sufficed under* Batson. *The Court needs to recognize the ineffectiveness of* Batson. *It could tweak the* Batson *test in different ways, such as by giving more weight to discriminatory effects or practices or by devising a stronger remedy. In the end, however, the only remedy that is adequate to the task is the one that Justice Marshall proposed in his* Batson *concurrence thirty years ago: elimination of the peremptory challenge.*

ARTICLE CONTENTS



Foster v. Chatman: A Missed Opportunity for *Batson* and the Peremptory Challenge

NANCY S. MARDER *

INTRODUCTION

In 2016, the United States Supreme Court decided *Foster v. Chatman*,[1] a capital case in which the Court concluded that prosecutors had exercised race-based peremptory challenges in violation of *Batson v. Kentucky*.[2] Based on the evidence, the Court reached the correct result in *Foster*, but it missed an opportunity to reassess whether *Batson*, a thirty-year old opinion, is up to the task it is supposed to perform. *Batson* was a compromise opinion meant to preserve the peremptory challenge but to eliminate peremptory challenges based on race. *Batson*, with its three-part test,[3] was meant to provide trial judges with a framework so that prosecutors had to give reasons for some, but not all, of their peremptory challenges. In the years that followed, the Court extended *Batson* so that it now applies in both criminal and civil cases,[4] to prosecutors and defense attorneys,[5] and to peremptory challenges exercised on the basis of race, ethnicity,[6] or gender.[7]

After thirty years of the *Batson* experiment, it is time for the Court to

---

* Professor of Law and Director of the Justice John Paul Stevens Jury Center, IIT Chicago-Kent College of Law. I thank Denny Curtis, Jeremy Eden, Adam Liptak, Judith Resnik, and Anna Roberts for helpful conversations about this case, as well as panel participants at the ABA Criminal Justice Section Roundtable, the Association for the Study of Law, Culture, and Humanities Annual Meeting, the Midwest Law & Society Retreat, and the Law & Society Association Annual Meeting for their comments on an early draft of this paper. I also thank Christina Gray for her research assistance and Scott Vanderlin and Clare Willis for their library assistance.

[1] 136 S. Ct. 1737 (2016). The Petition for Writ of Certiorari in *Foster* was filed on January 30, 2015. Petition for Writ of Certiorari, Foster v. Chatman, 136 S. Ct. 1737 (No. 14-8349). The Supreme Court granted the petition on May 26, 2015. *See* Foster v. Humphrey, 135 S. Ct. 2349 (2015). The Court heard oral argument on November 2, 2015, and it issued an opinion on May 23, 2016. *Foster*, 136 S. Ct. at 1737.

[2] 476 U.S. 79 (1986).

[3] *See infra* Section II, notes 111–16 and accompanying text.

[4] *Batson*, 476 U.S. at 96 (applying the test to prosecutors in criminal cases); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (extending *Batson* to civil cases).

[5] Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that *Batson* applied to defense attorneys when they exercised their peremptory challenges during jury selection).

[6] Powers v. Ohio, 499 U.S. 400, 402 (1991) (extending *Batson* to race and ethnicity, regardless of the race or ethnicity of the defendant).

[7] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (holding that gender-based peremptory challenges violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution).

reassess *Batson*, and its progeny,[8] and to recognize that *Batson* has failed to eliminate discriminatory peremptory challenges. There is extensive academic literature that is critical of *Batson* and delineates how easy it is to evade.[9] *Batson* was a noble effort to maintain the peremptory challenge and to eliminate discrimination during jury selection, but discriminatory peremptory challenges endure. If the Court is truly committed to nondiscrimination during jury selection, as the Equal Protection Clause requires, it needs to reexamine *Batson*. There are a number of approaches it can take to strengthen *Batson*, but each has shortcomings. In the end, the Court will need to abandon *Batson* and eliminate the peremptory challenge.

Foster, the most recent *Batson* challenge before the Supreme Court, is a good illustration of the ways in which *Batson* has failed to deliver on its promise. Petitioner Timothy Tyrone Foster, an African-American man who has been on death row for the past thirty years in Georgia, claimed that the prosecutors violated *Batson* by using peremptory challenges to strike four African-American prospective jurors during jury selection.[10] Foster was tried, convicted, and sentenced to death by an all-white jury.[11]

Foster's case provides an unusual window into the exercise of peremptory challenges and how prosecutors have managed to circumvent the proscriptions of *Batson*. Foster objected to the prosecutors' four peremptories; the prosecutors gave seemingly race-neutral reasons for the peremptories; and the trial judge and reviewing courts agreed.[12] However, Foster was able to obtain the prosecutors' notes years later through the

---

[8] *See supra* notes 4–7 (identifying the *Batson* progeny). I do not include Hernandez v. New York, 500 U.S. 352 (1991), among the *Batson* progeny. In *Hernandez*, the prosecutor exercised peremptories to remove Latinos from the jury and explained that these prospective jurors had hesitated before agreeing to accept the interpreter's translation instead of their own understanding of the Spanish language. *Hernandez*, 500 U.S. at 355–57. Thus, the case turned primarily on their body language in the courtroom and did not establish any extension of *Batson*.

[9] For a sampling of recent academic articles critical of *Batson*, see Sheri Lynn Johnson, Batson *from the Very Bottom of the Well: Critical Race Theory and the Supreme Court's Peremptory Challenge Jurisprudence*, 12 OHIO ST. J. CRIM. L. 71, 88–90 (2014); Nancy S. Marder, Batson *Revisited*, 97 IOWA L. REV. 1585, 1586 (2012) [hereinafter Marder, Batson *Revisited*]; Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1684 (2006); Barbara O'Brien & Catherine M. Grosso, *Beyond* Batson*'s Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Peremptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623, 1628 (2013); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 159–61 (2005); Tania Tetlow, *Solving* Batson, 56 WM. & MARY L. REV. 1859, 1864–65 (2015). For an extensive collection of early articles critical of *Batson*, see People v. Bolling, 591 N.E.2d 1136, 1144–45 (N.Y. 1992) (Bellacosa, J., concurring) (providing citations).

[10] *Foster*, 136 S. Ct. at 1742.

[11] *Id.*

[12] *Id.* at 1743.

Georgia Open Records Act.[13] The notes revealed that the prosecutors were working from a venire list that was color-coded by race, juror cards that indicated race, and a list of "definite NO's" that included all the African-American prospective jurors.[14] The notes revealed that the prosecutors in Foster's case were taking race into account at every step of jury selection, contrary to the commands of *Batson*.[15] The prosecutors' notes revealed the disjuncture between the proffered reasons and the motivating reasons.[16]

Foster claimed that the prosecutors exercised race-based peremptory challenges to remove the four remaining African-American prospective jurors on his venire.[17] Typically, this would be a fact-based inquiry that would not lead the Supreme Court to grant the petition for writ of certiorari, much less to exercise plenary review.[18] In *Foster*, however, the Court granted the writ of certiorari and decided the case after briefs on the merits and oral argument, perhaps because this *Batson* challenge included a "smoking gun." The prosecutors' notes made this a hard case to ignore. If the Court failed to find a *Batson* violation in a case like this, then *Batson* would have been bereft of any meaning at all. The only way to establish a *Batson* violation would have been if the prosecutor had said outright that he exercised his peremptories based on race. Few prosecutors would make such a rookie mistake.

Foster only asked the Court to consider his *Batson* claim and to find a *Batson* violation in his case, and this is all the Court did. The Court could have used *Foster* to reexamine *Batson* and the role of the peremptory challenge, even without being asked to do so by the petitioner, just as it once used *Batson*[19] to reassess the evidentiary standard required by *Swain v.*

---

[13] *Id.* at 1743–45; *see* GA. CODE ANN. §§ 50-18-70 to 50-18-77 (2002) (providing details on the purposes, procedures, and enforcement mechanisms of Georgia's open records laws).

[14] *Foster,* 136 S. Ct. at 1744-45.

[15] *Id.* at 1755.

[16] *Id.*

[17] Petition for Writ of Certiorari, *supra* note 1, at 9–10, *Foster*, 136 S. Ct. 1737 (No. 14-8349).

[18] Although the Court does not usually engage in error correction, in some instances it will do so in order to clarify the law for the lower courts. In such cases, a more likely response would be for the Court to decide the case summarily and without oral argument, and to issue a per curiam opinion. *See, e.g.*, Purkett v. Elem, 514 U.S. 765, 766 (1995) (per curiam).

[19] The question presented in *Batson* was whether the petitioner was tried "in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Batson v. Kentucky, 476 U.S. 79, 112 (1986) (Burger, C.J., dissenting) (quoting Petition for Writ of Certiorari i). Although the petitioner did not ask the Court to address *Swain v. Alabama*, 380 U.S. 202 (1965), the Court did address it. The *Batson* Court rejected *Swain*'s "crippling burden of proof," *Batson*, 476 U.S. at 92, which required a defendant to show that a prosecutor had exercised race-based peremptories in case after case, rather than in the defendant's case alone. *See id.* at 93 ("For reasons that follow, we reject the evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause."); *id.* at 100 (White, J., concurring) ("The Court overturns the principal holding in *Swain v. Alabama,* 380 U.S. 22 (1965).").

Alabama,[20] without explicitly being asked to do so. Instead, the Court issued a fact-bound opinion in *Foster*. The opinion does serve as a model to appellate courts of the kind of close reading that they can undertake in assessing a prosecutor's ostensibly race-neutral reasons. However, appellate courts tend to defer to trial judges' determinations in *Batson* challenges as the *Batson* Court had advised,[21] and the *Foster* Court did not instruct otherwise. Moreover, even the kind of close reading that the Court undertook in *Foster* depends on circumstances that are not present in every *Batson* challenge case, such as inconsistencies between the reasons the prosecutor gave for striking black jurors and the prosecutor's failure to strike white jurors with that same characteristic.

Although the Court missed an opportunity with *Foster*, there will be other *Batson* challenges and other opportunities. The Court needs to take one of these opportunities to try to make the *Batson* test more effective or to conclude that *Batson* is beyond repair. If the Court tweaks the *Batson* test, it can try to give the defendant a variety of ways of establishing discriminatory intent, which is a difficult showing for a defendant to make. It could do this by permitting the defendant to infer discriminatory intent from a "discriminatory effect" or a "discriminatory practice." Alternatively, it could add teeth to the remedy for a *Batson* violation, as North Carolina did in its short-lived Racial Justice Act of 2009.[22] North Carolina passed a statute that said if prosecutors exercised peremptories based on race in a capital case, the remedy would be a sentence of life in prison rather than death. In other words, North Carolina's statute took death off the table in an effort to get prosecutors to stop exercising peremptories based on race.[23] Finally, the Court could acknowledge that peremptory challenges continue to permit discrimination during jury selection and it could eliminate peremptory challenges. Although this last approach seems to be the most radical, in fact, it has roots that extend back to *Batson*. Justice Thurgood Marshall identified this remedy thirty years ago in his concurrence in *Batson*.[24]

This Article proceeds in five sections. Section I sets the stage and

---

[20] *Swain*, 380 U.S. at 223–24 (holding that discriminatory peremptories would violate the Equal Protection Clause, but the defendant had to show that the prosecutor had engaged in race-based peremptories in case after case, not just in the defendant's case).

[21] *See Batson*, 476 U.S. at 98 n.21 ("Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.").

[22] 2009 N.C. Sess. Laws § 15A-2011(b)(2) (codified as amended at N.C. GEN. STAT. § 15A-2011(b)(2)(2012)) (repealed 2013).

[23] N.C. GEN. STAT. § 15A-2012(a)(3) (repealed 2013).

[24] *See Batson*, 476 U.S. at 108 (Marshall, J., concurring) ("I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause, and I join the Court's opinion. However, only by banning peremptories entirely can such discrimination be ended.").

explains Foster's *Batson* challenge, including its smoking gun—the prosecutors' notes. Section II examines the Court's opinion in *Foster*. Petitioner Foster asked the Court to answer a narrow question—whether prosecutors exercised their peremptories in violation of *Batson*—and that is all the Court did. Section II examines the Court's opinion on its own terms, as a narrow application of *Batson*. The Court's opinion benefits Foster, but also serves as a model for how lower courts, particularly appellate courts, could do a careful reading of a prosecutor's reasons. The Court's opinion in *Foster* also builds on what the Court did in *Snyder v. Louisiana*,[25] *Miller-El v. Dretke*,[26] and *Miller-El v. Cockrell*.[27] In the end, however, the Court's close and careful reading of the prosecutors' reasons in *Foster* is limited to certain kinds of cases, and will not be of much aid to run-of-the-mill *Batson* challenges. Although the Court's approach in *Foster* is limited in scope, at least it shows that the Supreme Court is serious about uncovering *Batson* violations when the violation is made apparent, as it was in this case through the prosecutors' notes.

The Court's approach in *Foster*, described in Section II, resolves the case, but does not help rid jury selection of discriminatory peremptory challenges. With thirty years of *Batson* experience, more is needed to accomplish the goal that *Batson* was supposed to achieve. Section III identifies several ways that the Court could tweak the *Batson* test to make it stronger. For example, the Court could build on *Miller-El v. Cockrell* and infer discriminatory intent from discriminatory effects or discriminatory practices, which would be easier to show than outright purposeful discrimination. Section IV looks to state experimentation to see how a stronger remedy for a *Batson* violation could give *Batson* more bite.

In the end, however, the alternatives suggested in Sections III and IV are fraught with difficulties and do not offer a panacea to the problems that plague *Batson* and the peremptory challenge. Thus, Section V harkens back to Justice Marshall's approach and provides the only remedy that is adequate to the task. Section V recommends the elimination of peremptory challenges on the ground that they continue to permit discrimination in violation of the Equal Protection Clause. A growing number of trial court judges, who are in the trenches and responsible for implementing *Batson*, have come to share Justice Marshall's view that peremptories should be eliminated. The harms that peremptories cause defendants, prospective jurors, and communities are significant. Thirty years of experimentation with *Batson* suggest that it is time—well past time—for the Court to reexamine *Batson* and the peremptory challenge.

---

[25] 552 U.S. 472 (2008).
[26] 545 U.S. 231 (2005).
[27] 537 U.S. 322 (2003).

I. SETTING THE STAGE

A. *Background of Foster's* Batson *Challenge*

The petitioner, Timothy Tyrone Foster, an African-American man of limited mental ability, has been on death row since 1987, for the rape and murder of an elderly white woman.[28] At trial, on direct appeal, in his state habeas petition, and in his petition to the U.S. Supreme Court, Foster challenged the prosecutors' exercise of four peremptory challenges.[29] The venire of ninety-five prospective jurors had initially included ten African-Americans.[30] After the exercise of hardship excuses and for cause challenges in this death penalty case, four African-Americans remained: three women and one man.[31]

The two prosecutors[32] exercised peremptory challenges against all four remaining African-American prospective jurors. Foster raised a *Batson* challenge after the four were struck from the venire. During the *Batson* hearing that followed, Stephen Lanier, the lead prosecutor, explained that he looked at several factors in deciding whether to exercise a peremptory challenge. He told the court:

> In this case, we have a death penalty, and I want to state for the record that when I look at a death penalty, I look for more reasons than race. Race is not a factor. Age of the person is a factor of the witness – of the juror. The gender, female or male, the religious preference is something I always look at. When I strike a jur[or], I look at those combinations.[33]

He pointed out that his general approach in capital cases was to strike women because women were less likely than men to impose the death penalty.[34]

---

[28] *Foster*, 136 S. Ct. at 1743.

[29] However, during the hearing on Foster's Motion for New Trial, petitioner's lawyer at the time, Mr. James C. Wyatt, III, conceded that he would no longer challenge the prosecution's peremptory against Evelyn Hardge. *See* Transcript of Hearing on Motion for New Trial (Nov. 24, 1987), in 1 Joint App. at 69, 106, Foster v. Chatman, 136 S. Ct. 1737 (2016) (No. 14-8349) ("I'll concede Evelyn Hardge.") (quoting James Wyatt, Esq.); *see also id.* at 125 ("Your Honor, and for the record [Wyatt] conceded that striking Evelyn Hardge was not a factor—he conceded on the record that he was not contesting the striking of Mrs. Hardge.") (quoting Prosecutor Stephen F. Lanier).

[30] Brief for Petitioner at 4–5, *Foster*, 136 S. Ct. 1737 (No.14-8349).

[31] *Id.* at 6.

[32] The two prosecutors were Stephen F. Lanier (lead prosecutor) and Douglas Pullen (an assistant prosecutor who eventually became a trial court judge).

[33] Transcript of Argument on Objection Pursuant to *Batson v. Kentucky*, in 1 Joint App. at 41, *Foster*, 136 S. Ct. 1737 (No. 14-8349) [hereinafter *Batson* Hearing Transcript].

[34] *Id.* at 42. Foster's trial took place in 1987, which was seven years before the Court held that gender-based peremptory challenges violate the Equal Protection Clause. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994). At the hearing on Foster's motion for a new trial, Prosecutor Lanier

Prosecutor Lanier gave individual explanations for each of the four African-American prospective jurors whom he had removed from the venire. All of the prospective jurors had completed a five-page questionnaire and the parties had the opportunity to question each prospective juror individually for about thirty minutes. The lawyers had a weekend to consider their strikes. In this death penalty case, the defense had twenty peremptories and the prosecution had ten.[35]

Prosecutor Lanier explained during the *Batson* hearing that followed the exercise of his peremptories that he struck the one African-American man, Eddie Hood, mainly because he had a son who was near the age of the defendant, and the son had a prior conviction.[36] Hood also had a wife who worked at a hospital that treats mentally ill patients and the defendant was going to raise a claim about limited mental capacity.[37] The prosecutor noted that Hood had asked to be removed from the jury because of other commitments and that he had recently been hospitalized with food poisoning and it was unclear whether he would have medical reasons that would interfere with his capacity to serve.[38] The prosecutor added that Hood was slow to respond to questions, especially questions pertaining to the death penalty.[39] Finally, the prosecutor mentioned Hood's religious affiliation (Church of Christ) and how that might affect his view of the death penalty and the fact that his brother "counsels people in drugs," and that the defendant would be raising drugs as a "primary defense" in this case.[40]

After the prosecutor had given all of his reasons for dismissing Eddie Hood, the trial judge denied the defendant's *Batson* challenge and was prepared to proceed, but the prosecutor wanted to explain why he had struck the three African-American women; he wanted to "perfect the record."[41] The prosecutor presciently recognized that "five or ten years down the line I need to give a neutral explanation, and I have my explanations . . . and I want the Court to know my reasons for it."[42] He explained that he was striking prospective jurors with an eye to the death penalty phase: "So my whole objective in striking eighty percent women and two men were their views on

---

reiterated that his approach to death penalty cases was to strike female prospective jurors. *See Batson* Hearing Transcript, *supra* note 33, at 42 ("Women have a tendency in a case of this nature where the death penalty is being sought—they have serious reservations, time conflicts or whatever it may be, but that is what I look at when I am trying a death penalty case . . . .") (quoting Prosecutor Lanier).

[35] Transcript of Hearing on Motion for New Trial, *supra* note 29, at 103 ("[T]he defense has twenty [peremptories], and we have ten . . . .") (quoting Prosecutor Lanier).

[36] *Batson* Hearing Transcript, *supra* note 33, at 44. Eddie Hood's son was eighteen at the time and Foster was nineteen. *Id.*

[37] *Id.* at 45.

[38] *Id.* at 45–46.

[39] *Id.* at 46.

[40] *Id.*

[41] *Id.* at 49.

[42] *Id.*

death penalty and their relationship to their environment and the defendant. That is my whole purpose, certainly race neutral."[43]

As to the three African-American women, the prosecutor gave multiple reasons for each strike. He said that he had removed Marilyn Garrett because she looked "at the ground" when answering questions; her answers were "very short"; she was involved with Head Start, which "deals with low income, underprivileged children"; and her age was "so close" to that of the defendant.[44] He had removed Mary Turner because she had not been candid on one question on the questionnaire; she appeared "hostile to the Court and counsel"; and she did not make eye contact with the prosecution, but did with the defendant.[45] The prosecutor explained that he had removed Evelyn Hardge because she had talked to the defendant's mother before she entered the courtroom; she had answered some of the questions on the questionnaire incorrectly; and she "appeared confused, very easily swayed, irrational, bewildered, incoherent."[46] The trial judge upheld all of the strikes and found no *Batson* violation.[47]

After his conviction and death sentence, Foster made a motion for post-judgment discovery, in which he sought the prosecution's notes from jury selection.[48] Foster requested that the court conduct an in camera review of the notes and records and keep them so that they could be available for appellate review; however, the court denied this motion.[49]

Foster also renewed his *Batson* challenge in a motion for a new trial[50] and the court held extensive hearings on this motion on November 24, 1987.[51] The defense attorney sought to put the prosecutor on the stand and cross-examine him as to his motives for his strikes.[52] Although there seemed to be no authority for this procedure, the prosecutor agreed to take the stand and to answer questions in order to have the opportunity, on direct examination of the other prosecutor, to perfect the record and to make it unnecessary for the defense to have access to the prosecution's notes.[53]

---

[43] *Id.* at 57.

[44] *Id.* at 55–56. The Petitioner's Brief argues that Marilyn Garrett was thirty-four, whereas Timothy Foster was nineteen at the time of trial. Brief for Petitioner, *supra* note 30, at 8.

[45] *Batson* Hearing Transcript, *supra* note 33, at 52–53.

[46] *Id.* at 49–51.

[47] *Id.* at 58 ("Well, the Court is satisfied that *Batson* has been satisfied. The motion is overruled.") (quoting Judge John A. Frazier, Jr., Superior Court, Floyd County, Rome, Georgia).

[48] Motion for Post-Judgment Discovery, in 1 Joint App. at 61, 63, Foster v. Chatman, 136 S. Ct. 1737 (2016) (No. 14-8349).

[49] Order on Motion for Post-Judgment Discovery, in 1 Joint App. at 66, *Foster*, 136 S. Ct. 1737 (No. 14-8349).

[50] Transcript of Hearing on Motion for New Trial, *supra* note 29, at 69.

[51] *Id.* at 69–126.

[52] *Id.* at 75.

[53] *Id.* at 78–79.

In the hearing on the motion for a new trial, the questioning of the prosecutors focused on the particular African-American prospective jurors whom they had removed with peremptory challenges. For example, Prosecutor Douglas Pullen explained that they had removed Marilyn Garrett because of her demeanor.[54] He said that they had focused on the fact that she was a "social worker" who "worked at Head Start."[55] He also reiterated the point made by Prosecutor Lanier at the *Batson* hearing: "[Y]ou cannot separate one factor from another. We're judging a total human being up there, religion, their answers, their attitudes, the whole shooting match."[56] This hearing allowed the prosecutors to reiterate the main reasons that they had exercised strikes against the four African-American prospective jurors, as well as to add background information as to each of the prospective jurors that had not been introduced at the earlier *Batson* hearing.

The hearing on a motion for a new trial also gave the trial judge a chance to hear all the reasons in great detail,[57] to be updated on what other judges in other courts had found to be neutral reasons,[58] and to issue his own very lengthy and detailed opinion on the *Batson* challenge in this case, in which he denied the motion for a new trial.[59] Judge Frazier considered each of the African-American prospective jurors, except for Evelyn Hardge, who was no longer being challenged by the defense, and found the prosecutors' reasons to be race neutral and legitimate.[60] The judge acknowledged that some reasons seemed like they would be unlikely predictors of a juror's behavior, such as Mary Turner's employment at Northwest Georgia Regional Hospital, but he found other reasons more persuasive, such as her inaccurate response to a question on the questionnaire.[61] He was also persuaded by body language and demeanor, and in particular, the prosecutors' claim that Mary Turner had not made eye contact with them.[62] Interestingly, though, the judge did not indicate that he had noted this lack of eye contact during the voir dire.

---

[54] *Id.* at 93–94.

[55] *Id.* at 95. Although the prosecutors had claimed that Garrett's work at Head Start was their main justification for their strike when they explained it during the *Batson* hearing, they had not mentioned that she was a social worker. In fact, she was not a social worker; rather, she was a teacher's aide, as the petitioner points out in his brief to the Court. Brief for Petitioner, *supra* note 30, at 8. The hearing on a motion for a new trial, which took place on November 24, 1987, seven months after jury selection on April 20, 1987, shows how errors can be introduced after the fact. Transcript of Hearing on Motion for New Trial, *supra* note 29, at 69, 133.

[56] Transcript of Hearing on Motion for New Trial, *supra* note 29, at 96.

[57] *Id.* at 83–116.

[58] *Id.* at 117–26.

[59] Order on Motion for New Trial, in 1 Joint App. at 131, 144, Foster v. Chatman, 136 S. Ct. 1737 (2016) (No. 14-8349).

[60] *Id.* at 133–44.

[61] *Id.* at 138–39.

[62] *Id.* at 140–41.

In the end, the trial judge found the prosecutors' reasons neutral and reasonable. His conclusion about the prosecution's peremptory against Marilyn Garrett, namely "that there was no discriminatory intent, and that there existed reasonably clear, specific, and legitimate reasons for excusal of this prospective juror,"[63] expressed his findings with respect to the prosecution's peremptories against the other two African-American prospective jurors as well.[64] This case then went up on appeal to the Georgia Supreme Court, which found no error as to the *Batson* challenge and other issues, and affirmed the judgment of conviction and sentence of death.[65]

B. *The Twist: The Prosecutors' Notes*

What distinguished Foster's *Batson* challenge from myriad other *Batson* challenges was that he was ultimately able to obtain the prosecutors' notes from jury selection as a result of the Georgia Open Records Act,[66] even though he had been denied these notes in a motion for post-judgment discovery.[67] The notes come as close to a "smoking gun" as one is likely to find in a *Batson* challenge. The only starker example of a *Batson* violation would be if the prosecutor explicitly gave the prospective juror's race as his reason for exercising his peremptory, but it is unlikely that a prosecutor today would make that mistake. The excerpted notes, copies of which were included in Foster's Petition for Writ of Certiorari to the U.S. Supreme Court, Brief for Petitioner, the Joint Appendix, and a few pages of which are appended to this Article,[68] show that the prosecution's file included the venire list (of which there are four different copies) with the names of the black prospective jurors marked with a "B" and highlighted on each copy.[69] In addition, the questionnaires that each prospective juror completed prior to jury service included a question about the prospective juror's race.[70] For each juror who indicated that his or her race was "black," the race was circled.[71] The prosecutors also indicated on juror cards the race of several black prospective jurors with the designation "B#1," "B#2," and "B#3."[72]

---

[63] *Id.* at 143.

[64] *Id.* at 135–41.

[65] Foster v. State, 374 S.E.2d 188, 191-92, 197 (Ga. 1988).

[66] *See* GA. CODE ANN. §§ 50-18-70 to -77 (2002).

[67] Motion for Post-Judgment Discovery, *supra* note 48, at 61, 63; Order on Motion for Post-Judgment Discovery, *supra* note 49, at 66, 68 ("Having considered the motion and authority cited by Defendant, the Court denies his request that the Court impanel all notes and records which the State has concerning jury selection . . . .").

[68] *See* app. A at 1208–11.

[69] Brief for Petitioner, *supra* note 30, at 15.

[70] *Id.* at 17.

[71] *Id.* at 16-17.

[72] *Id.* at 17; *see also* app. A at 1210.

The prosecutors' notes also included comparisons among the black jurors.[73] For example, a note about Evelyn Hardge indicated: "Might be the [b]est one to put on [j]ury."[74] A draft affidavit from the prosecution's investigator noted that "[i]f it comes down to having to pick one of the black jurors, [Marilyn] Garrett, might be okay."[75] Perhaps most tellingly, the first five names on the list entitled "definite NO's" included the names of all the remaining African-American prospective jurors, plus one, Shirley Powell, who was excused for cause at the last minute.[76] The names are listed as follows: "(1) Hood, (2) Hardge, (3) Powell, (4) Garrett, (5) Turner, (6) Grindstaff."[77] "Grindstaff" refers to Bobbie Grindstaff, the only white prospective juror on the "definite NO's" list, and she, too, was struck by the prosecution.[78]

Although Foster presented this newly acquired information as part of his state habeas petition, the state habeas court denied relief on December 4, 2013.[79] With respect to the names of African-American prospective jurors highlighted in green, the state habeas court noted that the venire lists were circulated to a number of different people in the prosecutor's office; thus, it would be difficult to know who added the highlighting.[80] In addition, the state habeas court had before it affidavits from the two prosecutors, in which they had sworn or affirmed that they did not add the highlighting to the venire lists and that they had not instructed anyone else in their office to do so.[81] In addition, Prosecutor Pullen, who had since become a state trial judge, also stated in his affidavit that he did not rely on the highlighted venire lists in deciding how to exercise his peremptories.[82] The state habeas court also relied on the findings of the trial court and review by the Georgia Supreme Court on direct appeal and held that Foster's "renewed *Batson* claim [was] without merit."[83]

What is so remarkable about the prosecution's notes in this case is they

---

[73] Brief for Petitioner, *supra* note 30, at 17.

[74] *Id.* It is surprising that the prosecution thought that Evelyn Hardge "[m]ight be the [b]est one to put on [j]ury" when even the defense attorney and judge agreed that she was appropriately struck from the jury. *See* Transcript of Hearing on Motion for New Trial, *supra* note 29, at 106, 125 (including the defense attorney's concession and the judge's agreement that neither side would have wanted Evelyn Hardge).

[75] Brief for Petitioner, *supra* note 30, at 18.

[76] *Id.* at 19; *see also* app. A at 1211.

[77] Brief for Petitioner, *supra* note 30, at 19; *see also* app. A at 1211.

[78] Brief for Petitioner, *supra* note 30, at 19 & n.16.

[79] Foster v. State, No. 1989-V-2275 (Ga. Super. Ct. Dec. 4, 2013), in 1 Joint App. at 245, Foster v. Chatman, 136 S. Ct. 1737 (2016) (No. 14-8349).

[80] *Id.* at 193.

[81] Affs. of Stephen Lanier & Douglas C. Pullen, in 1 Joint App. at 168–71, *Foster*, 136 S. Ct. 1737 (No. 14-8349).

[82] *Id.* at 170–71.

[83] Order Denying Petitioner's Request for Habeas Relief, in Joint App. at 172, 196, *Foster*, 136 S. Ct. 1737 (No. 14-8349).

reveal that the prosecutors thought about race at every stage of the jury selection. When the prosecutors received the questionnaires from the prospective jurors, they (or others in their office)[84] circled the race of the prospective juror if that person was black, but not if that person was white. Similarly, they (or someone in their office) highlighted in bright green the names on the venire list of black prospective jurors and later identified black prospective jurors on their juror cards with a "B" and a number. The prosecution also considered the black prospective jurors in relation to each other—in other words, if they had to have one black juror on the jury, which one were they more inclined to have?

Although these various markings suggest that the prosecutors were well aware of the race of the prospective jurors, their list of "definite NO's," which contained the names of all five black prospective jurors, suggested that the prosecutors were not just aware of race, but that they held negative views about having jurors who were of a particular race—black—on the petit jury in this capital case. Their list of "definite NO's" suggested that they planned to remove each of the African-American prospective jurors *because* of their race in the order suggested by the list. They only needed to know that those prospective jurors were black to know that they did not want them on the petit jury. In fact, they *did* exercise their peremptories against the four African Americans in the order they appeared on the "definite NO's" list (after Shirley Powell, listed as #3, had been removed for cause).[85]

The prosecutors' notes revealed that they used their peremptories to exclude African-American prospective jurors in precisely the way that *Batson* was designed to prevent. Justice Powell, writing for the *Batson* Court in 1986, emphasized that the Court had been committed to nondiscrimination in jury selection for over a century.[86] Since *Strauder v. West Virginia*,[87] decided in 1880, the Court had recognized that the Equal Protection Clause "guarantee[d] the defendant that the State will not exclude

---

[84] Whether the two prosecutors or others in the office added the green highlighting to the venire list should not matter; the markings were the work product of the office. After all, the prosecutors were unwilling to turn over the venire lists when Foster sought the prosecutors' notes as part of a discovery request, which suggests that the prosecutors regarded the venire lists, replete with green highlighting, as part of the work product of their office. Indeed, the trial judge who denied the motion for post-judgment discovery also viewed the notes as part of the work product of the office and that was part of his reasoning in denying the motion. He explained: "In addition, it is noted that the material sought by the Defendant to be impaneled is such as would fall under the work product doctrine. The highest court of the land has declared that this doctrine applies in criminal as well as civil cases." Order on Motion for Post-Judgment Discovery, *supra* note 49, at 68.

[85] Brief for Petitioner, *supra* note 30, at 18–19.

[86] Batson v. Kentucky, 476 U.S. 79, 85 (1986).

[87] Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (holding that a state statute prohibiting African-American men from serving on juries violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution).

members of his race from the jury venire on account of race . . . or on the false assumption that members of his race as a group are not qualified to serve as jurors."[88] As the Supreme Court reaffirmed in *Batson*, prospective jurors were to be selected based on their "individual qualifications" and their "ability" to "impartially . . . consider evidence presented at a trial."[89]

C. *The Role of Reasons*

The prosecution notes suggest that the prosecutors had focused on the race of the prospective jurors from the moment they had been summoned to the courtroom; however, when the prosecutors were asked to give reasons for their peremptories, they had no difficulty providing detailed, specific, ostensibly race-neutral reasons.[90] They gave reasons that prosecutors often give for exercising a peremptory. Although this case was tried soon after *Batson* was decided, the prosecution gave reasons that have typically been given and upheld in the thirty years since *Batson* has been in effect.

The prosecutors in this case were savvy about the reasons they gave, anticipating reasons that would be viewed as race neutral and acceptable, not just in their case, but in future cases. In the years since *Batson* was decided, prosecutors have said that they are worried about prospective jurors who share some characteristics with the defendant (such as similar age and number of children),[91] have a family member who had a past experience with the criminal justice system,[92] belong to a particular profession,[93] live in a particular area (near drug dealing or near the defendant),[94] exhibited certain body language in the courtroom (lack of eye contact, too much eye

---

[88] *Batson*, 476 U.S. at 86 (citations omitted).

[89] *Id.* at 87.

[90] *See infra* text accompanying notes 111–16.

[91] *See, e.g.*, United States v. McMillon, 14 F.3d 948, 951, 953 (4th Cir. 1994) (holding that a prosecutor's reasons for exercising a peremptory challenge against the only African-American woman on the jury because of her age, number of children, and profession (computer analyst) were race neutral and not a pretext for racial bias).

[92] *See, e.g.*, Murray v. Groose, 106 F.3d 812, 815 (8th Cir. 1997) ("In the instant case, the prosecutor tendered specific, plausible, race-neutral explanations for his peremptory strikes of seven African-American members of the venire [including] . . . two because they had relatives who had been charged with or convicted of crimes . . . .").

[93] *See, e.g.*, *McMillon*, 14 F.3d at 953 (describing reasons for striking a prospective juror, including her profession as a computer analyst).

[94] *See, e.g.*, United States v. Uwaezhoke, 995 F.2d 388, 393 (3d Cir. 1993) (accepting as "race-neutral on its face" the government's explanation that it exercised a peremptory challenge against an African-American female juror "because of [her] likely place of residence, she was more likely to have had direct exposure to a drug trafficking situation than other potential jurors as a class").

contact),[95] wore a particular item of clothing ("dresses like a rock star"),[96] or had a particular hair style ("long hair" or "has a mustache and goatee") that the prosecutor did not like.[97] Typically, the only time these reasons do not work is when the prosecutor offers one of these reasons for striking a black prospective juror but allows a white prospective juror with the same feature to remain on the jury.[98]

In Foster's case, the prosecutors provided many of these reasons. At the *Batson* hearing, they explained that they removed Eddie Hood because he had a son with a misdemeanor conviction who was about the same age as the defendant and Hood had been slow to respond to questions especially about the death penalty.[99] They removed Marilyn Garrett because her age was close to that of the defendant and she worked for Head Start; in addition, she had appeared nervous and had not asked to be excused from the jury.[100] They removed Mary Turner because of inaccuracies on her questionnaire and because she had appeared "hostile," "confused," and "hesitant."[101] Finally, they removed Evelyn Hardge because she had appeared "confused" and "irrational."[102]

The prosecution offered multiple reasons for each of its strikes against African-American prospective jurors. Foster, in his Supreme Court brief, noted that the prosecution offered nine reasons for striking Eddie Hood, ten reasons for removing Marilyn Garrett, twelve reasons for removing Mary Turner, and nine reasons for removing Evelyn Hardge.[103] The prosecution took an "everything but the kitchen sink" approach to providing reasons, which allowed the trial judge to highlight the reasons that he found most relevant and to conclude that they were race neutral.

---

[95] *See, e.g.*, United States v. Ferguson, No. 92-5571, No. 92-5587, 1993 U.S. App. LEXIS 22373, at *9–10 (4th Cir. Sept. 1, 1993) (holding that the prosecutor's reasons for exercising a peremptory against an African-American juror who "stared" at the prosecutor and who might have difficulty with the complexities of the case were acceptable reasons).

[96] United States v. Clemons, 941 F.2d 321, 322–23, 325 (5th Cir. 1991) (holding that a prosecutor's reason for exercising a peremptory challenge against an African-American man because he dressed "like a rock star" was race neutral) (internal quotation marks omitted).

[97] Purkett v. Elem, 514 U.S. 765, 766 (1995) (per curiam) ("I struck [juror] number twenty-two because of his long hair. He had long curly hair . . . . And juror number twenty-four also has a mustache and goatee type beard. . . . And I don't like the way they looked, with the way the hair is cut, both of them.") (quoting the prosecutor) (alteration in original) (internal quotation marks omitted).

[98] *See, e.g.*, United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989) (holding that a peremptory was discriminatory when the prosecutor said that he struck a Latino prospective juror because he was from a certain city but did not strike a white prospective juror from that same city). For a more extensive discussion of this point, see *infra* Section II.B.3.

[99] *See supra* notes 36–40 and accompanying text (indicating the reasons to strike Hood).

[100] *See supra* note 44 and accompanying text (indicating the reasons to strike Garrett).

[101] *See supra* note 45 and accompanying text (indicating the reasons to strike Turner).

[102] *See supra* note 46 and accompanying text (indicating the reasons to strike Hardge).

[103] Brief for Petitioner, *supra* note 30, at 7–10.

Although the two prosecutors gave many reasons each time they removed an African-American prospective juror from the jury, the one reason they were careful not to give was race.[104] They had to avoid mentioning race in order to avoid a *Batson* violation. At the time of *Batson*, prosecutors could give any seemingly race-neutral reason as long as it was "related to the particular case to be tried."[105] They could even admit, as the prosecutors did in this case, that they exercised peremptories to exclude women because gender-based peremptories had not yet been prohibited.[106] They could admit to using gender, but they could not admit to using race as the basis for a peremptory challenge. As Prosecutor Lanier explained on the stand: "All I have to do is have a race neutral reason, and all of these reasons that I have given the Court are racially neutral."[107]

Although the prosecution's reasons seemed race neutral, their notes revealed otherwise. Their notes showed that they focused on the race of each prospective juror at every stage of the jury selection. Their notes also showed that their goal was to remove all of the African-American prospective jurors—all of whom appeared on their "definite NO's" list. They gave other reasons to justify their strike, but the underlying reason was the race of the prospective juror. What distinguishes this case from most other *Batson* challenge cases is that there were notes that revealed the prosecutors' actual reason for their peremptory challenges and which undercut the ostensible reasons that the prosecutors offered to the trial judge and the defendant.

II. EVALUATING *FOSTER* WITHIN THE NARROW CONFINES OF *BATSON*

In *Foster*, the Supreme Court carefully examined the prosecutors' reasons in a case involving a *Batson* violation. Petitioner Foster had asked the Court simply to decide whether the courts below had failed to recognize a *Batson* violation.[108] The Court's answer, after a close reading of the record, was "yes."[109] Working within the framework provided by *Batson* and reinforced by *Snyder v. Louisiana* and *Miller-El v. Cockrell*, the Supreme Court held in *Foster* that the prosecution exercised two peremptories based

---

[104] *See Batson* Hearing Transcript, *supra* note 33, at 41 ("In this case, we have a death penalty, and I want to state for the record that when I look at a death penalty, I look for more reasons than race. Race is not a factor.") (quoting Prosecutor Lanier).

[105] Batson v. Kentucky, 476 U.S. 79, 98 (1986). After Purkett v. Elem, 514 U.S. 765, 768–69 (1995), the reason does not have to be related to the case. It can be "silly or superstitious," *id.* at 768, just as long as it is not based on race or gender. *See id.* at 769 (explaining that the prosecutor does not have to give a reason "that makes sense, but a reason that does not deny equal protection").

[106] *See supra* note 34 (discussing when gender-based peremptories became a violation of the Equal Protection Clause).

[107] *Batson* Hearing Transcript, *supra* note 33, at 48.

[108] Petition for Writ of Certiorari, *supra* note 1, at 1.

[109] *See* Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016) ("[P]rosecutors were motivated in substantial part by race when they struck Garrett and Hood from the jury 30 years ago. Two peremptory strikes on the basis of race are two more than the Constitution allows.").

on race, and therefore, it had violated *Batson*.[110] The Court could have used *Foster* to make the *Batson* test more effective, or to acknowledge that *Batson* was ineffective and beyond repair, but the Court did neither. Instead, *Foster* is an opinion about how to do a close reading of the prosecutors' reasons particularly when there are prosecutors' notes that call into question the prosecutors' reasons. Although this lesson could be useful for appellate courts because they have the luxury of time and a record, it provides little guidance for trial judges who have to make *Batson* rulings quickly and with limited information.

The starting point of any *Batson* challenge is the three-part test that the Court delineated in *Batson*.[111] Under *Batson*, a defendant first has to show an inference of purposeful discrimination by the prosecutor in order to establish a prima facie case. He can do this by showing that "he is a member of a cognizable racial group," that peremptories permit discrimination by those "who are of a mind to discriminate," and that the prosecutor has used a peremptory to exclude a prospective juror on account of his or her race.[112] The *Batson* Court instructed lower courts that they need to "undertake a 'factual inquiry' that 'takes into account all possible explanatory factors'" when assessing whether the defendant has established a prima facie case of discriminatory peremptories.[113] The *Batson* Court explained that a "pattern" of discriminatory peremptories might give rise to an "inference of discrimination" needed to establish a prima facie case, as would questions or statements made by the prosecutor during voir dire, but it remained for the trial judge to decide if the defendant had met his burden.[114] Once the defendant has established a prima facie case (step one), the burden shifts to the prosecutor to provide race-neutral reasons for his peremptories (step two).[115] It then remains for the trial judge, at step three, to decide whether those reasons are pretextual or not. In *Foster*, there was agreement that the defendant had met his burden at step one and the prosecution had met its burden at step two.[116] The question in this case was whether the trial judge should have found purposeful discrimination at step three.

Although Foster had raised his *Batson* challenge in a state habeas

---

[110] *Id.* at 1755.

[111] *Batson*, 476 U.S. at 96-98.

[112] *Id.* at 96 (internal citations omitted).

[113] *Id.* at 95 (citation omitted) (emphasis added). Whereas *Swain v. Alabama*, 380 U.S. 202, 227–28 (1965), had required the defendant to show that the prosecutor had engaged in discriminatory peremptories in case after case, *Batson* required a showing only in the defendant's own case. *Batson*, 476 U.S. at 95.

[114] *Batson*, 476 U.S at 97.

[115] *Id.*

[116] *Foster*, 136 S. Ct. at 1747.

court,[117] and added the prosecutors' notes to his petition when he received them, the state habeas court failed to reexamine the prosecutors' reasons carefully in light of the prosecutors' notes.[118] *Snyder* instructs trial judges when "considering a *Batson* objection," and reviewing courts when considering "a ruling claimed to be *Batson* error," that "*all* of the circumstances that bear upon the issue of racial animosity must be consulted."[119] The state habeas court did not do this; thus, the Supreme Court undertook this analysis.

The Court, in an opinion written by Chief Justice John Roberts, carefully reviewed the reasons that the prosecution had given for striking two African-American prospective jurors, Marilyn Garrett and Eddie Hood.[120] The prosecutors' notes, which suggested that race was considered by the prosecutors throughout jury selection, required the Court to review the prosecutors' reasons with the notes in mind.[121] In doing so, the Court found much amiss.[122]

The Court examined the prosecutors' reasons carefully and found reasons that were inconsistent or not supported by the record. For example, Prosecutor Lanier offered many reasons why he struck Marilyn Garrett and Eddie Hood.[123] Lanier said that he struck Garrett because the defense did not ask her questions about insanity, alcohol, or publicity, even though the transcript shows that the defense did.[124] Lanier also explained that he struck Garrett because she was divorced, even though he left on the jury three white jurors who were also divorced.[125] The prosecution gave eight reasons for striking Hood, including that he had a son about the same age as the defendant; the son had been convicted of a crime; and Hood was a member of the Church of Christ.[126] The Court found that some of the prosecution's reasons for striking Hood were not applied to white prospective jurors and still other reasons "shifted over time, suggesting that those reasons may be pretextual."[127]

A. *Benefits of the Opinion*

The Court's opinion in *Foster*, though it does not add anything new to the *Batson* analysis, does provide several benefits. One benefit is that the

---

[117] *Id.* at 1743.
[118] *Id.* at 1748.
[119] Snyder v. Louisiana, 552 U.S. 472, 478 (2008) (emphasis added).
[120] *Foster*, 136 S. Ct. at 1748.
[121] *Id.* at 1749.
[122] *Id.*
[123] *Id.* at 1748–54.
[124] *Id.* at 1748–51.
[125] *Id.* at 1750.
[126] *Id.* at 1751–52.
[127] *Id.* at 1751.

Court found a *Batson* violation, which is of great consequence to Foster.[128] Another benefit is that it provides a model for how to do a close reading of the reasons offered by a party to justify its exercise of a peremptory challenge. The Court did not accept the prosecutors' reasons at face value; rather, it looked carefully to see whether the reasons were supported by the record and whether the prosecution applied these reasons consistently to white prospective jurors as well as black prospective jurors.[129] The opinion also builds on the Court's approach in *Miller-El v. Cockrell* and *Snyder v. Louisiana*. In both of these cases, the Court evaluated prosecutors' reasons with great attention to detail because the jury selection practices in *Miller-El* and the prosecutors' reasons in *Snyder* raised concerns that race was the actual motivation for the exercise of peremptory challenges, in spite of the prosecutors' ostensibly race-neutral reasons.[130] In *Foster*, the prosecutors' notes, like the jury selection practices in *Miller-El*, raised serious concerns, which led the Court to review the prosecutors' reasons with the utmost care.[131]

1. *Results for Foster*

In his Petition for Writ of Certiorari, Foster asked the Supreme Court to decide whether there had been a *Batson* violation during jury selection at his trial.[132] The Court adhered to the narrow question presented and held that there had indeed been a *Batson* violation.[133] Foster waited almost thirty years for a court to reach this result.[134] He raised the issue during jury selection at his trial in 1987 and had a *Batson* hearing in which the trial judge denied his *Batson* challenge.[135] He again raised it in a motion for a new trial, after he had been convicted and sentenced to death.[136] The trial judge held an evidentiary hearing and denied the *Batson* challenge once again.[137] Foster raised his *Batson* challenge on direct appeal to the Georgia Supreme Court and that court rejected his claim as well.[138] He then raised it before a state habeas court, and while it was pending added the prosecutors' notes, which

---

[128] *Id.* at 1742-43, 1755. Admittedly, the Supreme Court does not typically engage in error correction, and if it does, it tries to do it through summary reversal in a per curiam opinion rather than through plenary review, but of course in a capital case errors can have dire consequences.

[129] *Id.* at 1750.

[130] Snyder v. Louisiana, 552 U.S. 472, 479–84 (2008); Miller-El v. Cockrell, 537 U.S. 322, 331–35 (2003).

[131] *Foster*, 136 S. Ct. at 1748–54.

[132] Petition for Writ of Certiorari, *supra* note 1, at i.

[133] *Foster*, 136 S. Ct. at 1755.

[134] *Id.*

[135] *Id.* at 1742.

[136] *Id.* at 1743.

[137] *Id.*

[138] *Id.*

he obtained through the Georgia Open Records Act, but the state habeas court and the Georgia Supreme Court rejected his *Batson* claim.[139] Foster waited a long time for a court to agree that prosecutors in his case had violated *Batson*. His claim that his jury selection was conducted in violation of *Batson* has finally been vindicated by a court, and not just by any court, but by the U.S. Supreme Court.

The Court's opinion not only vindicates Foster with respect to his *Batson* claim, but also raises the possibility of a new trial. The Supreme Court remanded the case to the state courts "for further proceedings not inconsistent with this opinion."[140] As Justice Alito explained in his separate opinion concurring in the judgment, the state courts will have to accept the Supreme Court's analysis of federal law, but they can determine whether Foster gets relief under state law.[141] If state res judicata law does not bar relief, then Foster could get a new trial.[142] Though it is unlikely, the prosecutor could decide not to retry Foster since he has already served thirty years and a thirty-year old case might be hard to retry. If that were the case, Foster would have gone from being on death row to being released from prison. The benefit of the Court's opinion could make all the difference—the difference between death and freedom—to Foster.

The Court's opinion in *Foster* also reassures the public that a blatant violation of *Batson* will not be ignored. The "smoking gun" in this case—the prosecutors' notes—revealed how omnipresent race was during jury selection and how prosecutors used it to keep African-American prospective jurors from serving on the jury. The reasons the prosecutors gave for the exercise of their peremptory challenges might have seemed race neutral on the surface, but the notes revealed the unspoken motive. If the Supreme Court were to turn a blind eye to such notes, then there would be little left to *Batson*. If the notes did not constitute a *Batson* violation, then the only way to violate *Batson* would be for a lawyer to say that he or she struck a prospective juror based on race. After thirty years of *Batson*, few lawyers would make that mistake.

2. *Providing a Model for a Close Reading of Reasons*

Another benefit of the Court's opinion in *Foster* is that it provides an example for lower courts, especially appellate courts, of how to read the reasons and record carefully to see if there are inconsistencies that suggest

---

[139] *Id.* at 1743, 1745.[140] *Id.* at 1755.

[140] *Id.* at 1755.

[141] *Id.* at 1760–61 (Alito, J., concurring in the judgment). The majority was less explicit than Justice Alito was about the state court's role, and focused mainly on the Court's jurisdiction to hear the claim: "[The state habeas court's] invocation of res judicata therefore poses no impediment to our review of Foster's *Batson* claim." *Id.* at 1746–47.

[142] *See* Mark Walsh, *B for Black*, A.B.A. J., Aug. 2016, at 20, 21 ("[Stephen] Bright believes his client [Foster] will receive a new trial.[]").

that the reasons were pretextual. The Court in *Foster* does a close reading of the prosecutors' reasons. Although the reasons, on the surface, seem race neutral, the inconsistencies suggest otherwise.[143]

The Court in *Foster* found different types of inconsistencies, including an inconsistency between what the prosecutor said at one point in time and what he said at another point in time.[144] For example, Prosecutor Lanier originally explained at the *Batson* hearing before Foster's trial that he struck prospective juror Eddie Hood for an array of reasons, but foremost was because of Hood's son's age: "*The only thing I was concerned about*, and I will state it for the record. He has an eighteen year old son which is about the same age as the defendant."[145] At the evidentiary hearing after the trial, Lanier gave Eddie Hood's religious affiliation as his main reason for striking him from the jury: "And *the bottom line* on Eddie Hood is the Church of Christ affiliation."[146] The Court explained that a shift in reasons over time suggests to it that the reasons "may be pretextual."[147] Thus, one lesson that lower courts can draw from the opinion is to look for a shift in reasons over time.

Another type of inconsistency that suggests a reason might be pretextual is when the prosecutor gives a reason for striking a black prospective juror but does not apply that same reason to a white prospective juror. For example, Lanier explained that one reason he struck Marilyn Garrett was because she attended a high school near the neighborhood where the victim lived, yet she said she was unfamiliar with the neighborhood.[148] The prosecutor concluded that Garrett was not being forthright in her responses during voir dire.[149] However, when Martha Duncan, a white prospective juror who lived near the neighborhood where the murder occurred, was asked about her familiarity with the neighborhood, she said she was unfamiliar with it; however, she was permitted to serve on the jury.[150] The prosecutor interpreted the similar responses differently; Garrett had been dishonest, whereas Duncan had been truthful.

The Court in *Foster* pointed to several other instances in which the prosecutor's reason for striking a black prospective juror was not applied to a white prospective juror. For example, Lanier said that he struck Eddie

---

[143] *Foster*, 136 S. Ct. at 1748–54.

[144] *Id.* at 1751.

[145] *Id.* (internal quotation marks omitted).

[146] *Id.* at 1752 (internal quotation marks omitted).

[147] *Id.* at 1751.

[148] *Id.*

[149] *Id.*

[150] *Id.*

Hood because he had a son who was close in age to Foster,[151] yet Lanier did not strike Billy Graves, a white juror who had a seventeen-year old son, or Martha Duncan, a white juror who had a twenty-year old son.[152] Lanier said that "he struck [Marilyn] Garrett because she was divorced[,]. . . [b]ut he declined to strike three out of the four white prospective jurors who were also divorced."[153] The approach taken by the Court in *Foster*—finding a reason to be pretextual if it is used to justify a strike of a black prospective juror but not a white prospective juror—is not original to *Foster*,[154] but the opinion in *Foster* reminds lower courts to look for such an inconsistency. Indeed, lower courts have long relied on this type of inconsistency as an indication that the reason is pretextual.[155]

3. Building on Miller-El *and* Snyder

Foster, even though it simply works within the *Batson* framework, nonetheless builds upon *Miller-El v. Cockrell*[156] and *Snyder v. Louisiana*,[157] and reinforces the point that courts need to give a close reading to the reasons given for exercising a peremptory challenge, particularly if there are other indications that race is a factor in a particular jury selection.

Miller-El v. Cockrell, in particular, suggests that reasons, even seemingly race-neutral reasons, can be shown to be pretextual by racially discriminatory practices. In *Miller-El*, a death penalty case involving an African-American defendant and a white victim, the prosecutor struck ten out of eleven African-American prospective jurors (91%) through the exercise of his peremptory challenges, whereas he struck only four out of thirty-one non-black prospective jurors (13%).[158] The prosecutor also engaged in three additional practices that revealed discriminatory treatment of African-American prospective jurors. The prosecutor prefaced his questioning of African-American prospective jurors by painting a vivid picture of what the death penalty entailed and then asked African-American prospective jurors if they thought they could impose the death penalty. However, when the prosecutor questioned white prospective jurors, he did not paint such a grim picture; thus, he made it easier for them to say they

---

[151] At the time of jury selection, Hood's son was eighteen and Foster was nineteen. *See supra* note 36.

[152] *Foster*, 136 S. Ct. at 1752.

[153] *Id.* at 1750.

[154] *See, e.g.*, Snyder v. Louisiana, 552 U.S. 472, 483 (2008) ("The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'.").

[155] *See, e.g.*, United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989) ("The government stated that it rejected juror Osuna due to his residence (La Mesa) . . . . However, another unchallenged juror lived in La Mesa.").

[156] 537 U.S. 322 (2003).

[157] 552 U.S. at 472.

[158] 537 U.S. at 331.

could vote for the death penalty.[159] The prosecutor also asked prospective jurors about their willingness to impose the minimum sentence for murder. Here, too, the question was phrased differently depending on the race of the prospective juror. White prospective jurors were told what the statutory minimum was and were asked if they could adhere to it, whereas African-American prospective jurors were asked what they thought the minimum should be.[160] Another practice, called "jury shuffling," enables parties in Texas to ask the clerk to reshuffle the jury cards and reorder the prospective jurors.[161] The prosecutors in this case made use of jury shuffling whenever a significant number of African-American prospective jurors had moved to the front of the queue for consideration as jurors.[162]

In *Miller-El*, the Supreme Court identified these practices as revealing race-based bias in jury selection even though the reasons given by the prosecutor were ostensibly race neutral; *Foster* raised a similar issue. The prosecutors in *Foster* gave seemingly race-neutral reasons, but their notes revealed that they exercised their peremptories based on race.[163] Their notes showed not only that they took race into account, but also that they viewed African Americans in a negative light when it came to having them serve as jurors in this death penalty case.[164] The trial judge found the prosecutors' reasons to be race neutral, but he did not have the prosecution's notes before him.[165] The state habeas court did have the notes, but did not find that the notes undermined the reasons given by the prosecutors.[166] *Batson* requires lower courts to take account of "all possible explanatory factors" and "all relevant circumstances,"[167] as reinforced by *Snyder v. Louisiana*.[168] *Miller-El* provides precedent for lower courts to consider prosecutors' racially discriminatory practices even if the reasons they give appear on the surface

---

[159] *Id.* at 332.

[160] *Id.* at 333.

[161] *See id.* at 333–34 (explaining the process of "jury shuffling").

[162] *Id.* at 334.

[163] Foster v. Chatman, 136 S. Ct. 1737, 1744 (2016).

[164] *Id.*

[165] *See id.* at 1743.

[166] *Id.* at 1745.

[167] Batson v. Kentucky, 476 U.S. 79, 95–97 (1986) (citation omitted). Although the *Batson* Court instructed trial judges to take account of "all possible explanatory factors" and "all relevant circumstances" that the defendant provided in trying to show "an inference of purposeful discrimination" needed to establish a prima facie case at step one, *id.*, the *Miller-El* Court explained that all of those factors or circumstances should also be considered at step three when the trial judge had to decide whether the defendant had met his burden of establishing purposeful discrimination: "It goes without saying that this includes the facts and circumstances that were adduced in support of the prima facie case." *Miller-El*, 537 U.S. at 340.

[168] Snyder v. Louisiana, 552 U.S. 472, 476–78 (2008) (instructing lower courts to consider whether the prosecution's race-neutral reasons were a pretext for purposeful discrimination in light of "all of the circumstances that bear upon the issue of racial animosity").

to be race neutral.[169] *Miller-El* noted that discriminatory practices, such as when "prosecutors marked the race of each prospective juror on their juror cards," should serve as a signal to reviewing courts to consider that "race was a factor."[170] The state habeas court failed to give weight to such a practice in *Foster*, as the Court had instructed in *Miller-El* and *Snyder*. The Court reinforced that lesson in *Foster*.

Foster, like *Snyder* and *Miller-El*, provides a lesson to lower courts in how to engage in a careful and fact-intensive analysis of the *Batson* challenge before it. *Snyder* and *Miller-El* show that the Supreme Court is willing to engage in a very close reading of the reasons and the record to determine whether the prosecutor's seemingly race-neutral reasons should be accepted. In *Snyder*, for example, Justice Alito, writing for the Court, engaged in a very careful comparison between the reasons the prosecutors gave for striking an African-American prospective juror because of another obligation he had even though a white prospective juror with a more acute conflict was permitted to serve on the jury.[171] In *Miller-El v. Cockrell*, Justice Kennedy, writing for the Court, examined the background jury selection practices against which the prosecutor's peremptories had to be assessed to determine whether they were race neutral.[172]

If nothing else, *Miller-El*, *Snyder*, and now *Foster*, show that the Supreme Court is serious about wanting trial judges and appellate courts to scrutinize prosecutors' reasons carefully. These cases also show that the Supreme Court is willing to engage in careful, fact-specific review even when the reviewing courts are unwilling to do so. Thus, the Court's careful, fact-specific review that it undertook in *Snyder*, *Miller-El*, and now *Foster* puts lower courts on notice that they are to engage in a similarly careful analysis of *Batson* challenges. Such an approach also teaches lower courts that if they fail to review *Batson* challenges carefully, then the Court will step in and undertake such review on its own, as it did in *Foster* and *Snyder*, and twice in *Miller-El*.[173]

B. *Limitations of the Opinion*

The opinion in *Foster*, even if viewed as simply answering the narrow

---

[169] *See Miller-El*, 537 U.S. at 343–46.

[170] *Id.* at 347.

[171] *Snyder*, 552 U.S. at 482–83.

[172] *Miller-El*, 537 U.S. at 335 ("It is against this background that we examine whether petitioner's case should be heard by the Court of Appeals.").

[173] *See* Miller-El v. Dretke, 545 U.S. 231, 266 (2005) (holding that the prosecutors' use of discriminatory practices during jury selection undermined the race-neutral reasons that they gave for their peremptory strikes of African-American prospective jurors; the Court reversed the Court of Appeals for the Fifth Circuit's judgment in light of the *Batson* violations that infected the jury selection); *Miller-El*, 537 U.S. at 348 (holding that in light of the race-based practices used by prosecutors during jury selection, the Court of Appeals for the Fifth Circuit erred in denying the defendant a certificate of appealability (COA) from the district court's determination of no *Batson* violation).

question whether there had been a *Batson* violation, has several limitations. One limitation is that it does not provide a workable approach for trial judges, who have neither the time nor the record to scrutinize the prosecutor's reasons in the close way that the Supreme Court did. At best, it is an approach that appellate courts could attempt, though they tend to be deferential to the trial judge and the Supreme Court did not tell them to do otherwise. Another limitation is that without some other indicia that race is being used, such as prosecutors' notes or jury shuffling, trial judges have little choice but to accept the prosecutor's seemingly race-neutral reasons. There is little that they can do to discern otherwise. One exception is when prosecutors give a reason for striking a black prospective juror but accept a white prospective juror with the same characteristic.[174] However, not every case will have white and African-American prospective jurors who are similarly situated. Yet another limitation is that trial judges are supposed to be able to assess the credibility of the prosecutor when he or she gives reasons for a peremptory, but prosecutors, like most lawyers, can assert their seemingly race-neutral reasons with confidence. They might even convince themselves that their reasons are race neutral.[175] A trial judge will have little basis to probe a prosecutor's reasons very deeply and many reasons to accept what the prosecutor has said.

1. *An Unworkable Approach for Trial Judges*

The kind of close reading that the Supreme Court gave to the prosecutors' reasons and the record in *Foster* are not usually available to a trial court judge when a party raises a *Batson* challenge during jury selection. The approach that the Court took in *Foster* is not a model for a trial judge in the courtroom. If it is a model for any lower court, it would be an appellate court, and appellate courts tend to defer to the trial judge. The Supreme Court needs to instruct appellate courts that their review of a *Batson* challenge needs to be less deferential to the trial judge and more searching of the reasons and the record.

a. Limited Time and Record

As the record made clear in *Foster*, the trial judge held a *Batson* hearing

---

[174] *See infra* Section II.B.3 (describing this approach in greater detail).

[175] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."); Walsh, *supra* note 142, at 21 (quoting Maureen A. Howard, a former Washington state prosecutor and now a law professor, who explained that prosecutors might exercise discriminatory peremptories because of unconscious bias in which they are "unaware of their own implicit bias when analyzing their reasons for dismissing a potential juror of color").

during which he heard several reasons from the prosecutor for striking Eddie Hood. He was then prepared to accept that the prosecution's four peremptories against four African-American prospective jurors were not race based.[176] However, the prosecutor, who wanted to perfect the record,[177] was permitted to give reasons for the additional three African-American prospective jurors he struck. The reasons the prosecutor provided were numerous and specific and the trial judge accepted them as race neutral.

Judge Frazier, the trial judge, had another opportunity to assess the prosecutors' reasons during the evidentiary hearing that he held after Foster had filed a motion for a new trial.[178]At that hearing, which came after the trial and after a jury verdict of guilty and a sentence of death, there was extensive examination of the prosecutors' reasons for striking the four African-American prospective jurors.[179] At that point, the trial judge might have been able to discern the shift that the Supreme Court noted, in which the prosecutor had originally emphasized that he struck Eddie Hood because of his son's age and past conviction, whereas later he highlighted that he struck Hood because of his affiliation with the Church of Christ.[180] However, the prosecutor offered numerous reasons for each strike and explained that he had not relied on any one reason. The prosecutor had also said that he looked at an individual as a unique mix of characteristics and it was not any one characteristic that was decisive for him.[181] He also explained that with only ten peremptory challenges (as opposed to the defendant's twenty), he could not really select the jurors he wanted, but could only eliminate those he thought would be least willing to vote for the death penalty.[182]

Judge Frazier, in his opinion in which he denied Foster's motion for a new trial, assessed the reasons the prosecutor had given to explain his peremptory strikes. The trial judge acknowledged that some reasons were less likely than others to predict juror behavior, but he nevertheless found them to be race neutral.[183] At this point, most trial judges have too little information with which to work. In addition, after having gone through a trial, they are probably reluctant to disturb a jury's verdict and sentence.

---

[176] *See supra* notes 36–47 and accompanying text.

[177] *Batson* Hearing Transcript, *supra* note 33, at 99.

[178] Transcript of Hearing on Motion for New Trial, *supra* note 29, at 69.

[179] *Id.* at 93–112.

[180] *Compare Batson* Hearing Transcript, *supra* note 33, at 44, *with* Transcript of Hearing on Motion for New Trial, *supra* note 29, at 110–11.

[181] Transcript of Hearing on Motion for New Trial, *supra* note 29, at 96.

[182] *Id.* at 103.

[183] *See* Order on Motion for New Trial, *supra* note 59, at 138–39 (explaining that the trial judge thought Mary Turner's employment at Northwest Georgia Regional Hospital was unlikely to predict how she would view the case, but that other reasons the prosecutor gave for striking her from the jury were neutral and legitimate).

b. The Difficulties of Assessing the Prosecutor's Reasons and Credibility

The *Batson* Court left trial judges to figure out how to implement *Batson*.[184] This approach seemed reasonable, at least to the majority in *Batson*,[185] because trial judges are in the courtroom. They can observe the lawyers and prospective jurors during jury selection and they can hear the reasons given by a prosecutor once the defendant has raised a *Batson* challenge.

The problem is that trial judges do not have the tools that are available to the Supreme Court when it reviews a *Batson* challenge, and the tools that trial judges have do not tell them very much. When a defendant raises a *Batson* challenge during jury selection, the trial judge has the reasons that the prosecutor gives during a sidebar or a *Batson* hearing. There is no extensive record at this point. Yet, the trial judge will need to make a decision so that jury selection can proceed. Although the trial judge has the prosecutors' reasons, after thirty years of *Batson*, there are myriad reasons that have long been found to be acceptable.[186] One judge highlighted how well-known and contradictory the reasons are by compiling a list, based on Illinois case law, which he thought prosecutors could distribute under the title "'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'"[187] When a prosecutor provides one or more of these reasons, the trial judge has little choice but to find the reason to be race neutral. As *Purkett v. Elem*[188] established, the reasons for a peremptory can be "silly or superstitious" or even unrelated to the case, just as long as they are not based on race.[189]

A prosecutor knows not only which reasons are acceptable, but also how to present them. One reason appellate courts are supposed to defer to the trial judge's finding is that the trial judge is in the courtroom. He or she is

[184] Batson v. Kentucky, 476 U.S. 79, 99 n.24 (1986) ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today.").

[185] Chief Justice Burger, writing in dissent, criticized the majority for leaving trial judges with an impossible task. He observed: "The Court essentially wishes these [trial] judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created 'right.' I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding." *Id.* at 131.

[186] *See supra* notes 91–98 and accompanying text (providing cases with many of the acceptable reasons).

[187] People v. Randall, 671 N.E.2d 60, 66 (Ill. App. Ct. 1996). Among the many acceptable reasons are the following: "[T]oo old, too young, divorced, 'long, unkempt hair,' free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, 'lived in an area consisting predominantly of apartment complexes,' single, [and] over-educated." *Id.* at 65–66 (footnotes omitted).

[188] 514 U.S. 765 (1995) (per curiam).

[189] *Id.* at 768.

supposed to be able to assess the credibility of the prosecutor or the body language of a juror. The difficulty is that the prosecutor can present his or her reasons with confidence, like most lawyers making an argument in court. In addition, a prosecutor is a repeat player in the courtroom and has defended *Batson* challenges before. A judge would be hard pressed to find that the prosecutor's delivery was not credible.

Although the judge is indeed in the courtroom, he or she might not observe every prospective juror with the same attention to detail that a party does. Thus, when the prosecutor says that he struck a prospective juror because of her body language or demeanor, such as too much or too little eye contact, the judge might not have observed the prospective juror's eye contact with the prosecutor. After all, it is in each party's interest to be particularly observant, whereas the trial judge, who certainly tries to be observant, also has responsibility for presiding over the proceeding and maintaining order in the courtroom. The prosecutor might focus exclusively on the prospective juror during voir dire, whereas the judge will have the entire courtroom to observe. Thus, the judge has little choice but to accept the prosecutor's observations.

2. *The Limited Role of Appellate Courts*

The tools that the Supreme Court used to assess the *Batson* challenge in *Foster* are tools that are more readily available to an appellate court than a trial judge. An appellate court has the time to review the record and to do a careful reading of the reasons the prosecutor has given and to see if the reasons have been applied inconsistently or have shifted over time. The Court in *Foster* should have made clear to appellate courts that they are expected to do the kind of close reading that Court did in *Foster*.[190] The problem is that appellate courts, following the instruction of *Batson,* have said that trial judges are in the best position to decide a *Batson* challenge because they are in the courtroom and can observe the demeanor and body language of jurors and assess the credibility of the prosecutor.[191] As a result, appellate courts tend to defer to a trial judge's determinations. However, the trial judge has limited tools to discern race-based peremptories. The trial judge does not have the tools that an appellate court has to undertake a close

---

[190] Perhaps the Court in *Foster* was reticent to instruct state appellate courts to undertake a close reading of the prosecutor's reasons because the Court wants to be respectful of state courts and would prefer to issue such a reminder to federal courts of appeals. If this is the case, then perhaps the Court will offer such guidance in the next *Batson* challenge it agrees to hear coming from a federal court, though in my view, it would be preferable for the Court to abandon *Batson* altogether. *See infra* Section V.

[191] The Seventh Circuit, for example, has said that deference to the trial judge is appropriate because the trial judge is in the courtroom and is in the best position to make these factual findings. Tinner v. United Ins. Co. of Am., 308 F.3d 697, 703 (7th Cir. 2002). The Seventh Circuit further explained that it would accept a trial judge's rulings in a *Batson* challenge unless they were "completely outlandish" or their "falsity" was readily apparent. *Id.* (quoting United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir.), *and modified*, 136 F.3d 1115 (1998)).

reading, and the tools that the trial judge does have do not tell her much. Without some indication that the prosecutor's reasons are not what they seem, the trial judge has little to base her decision on but the reasons the prosecutor has given.

3. *Close Readings in Limited Cases*

Both trial judges and appellate courts seem to be in need of more than the prosecutor's reasons in order to find that the reasons are race based. In *Foster*, the Supreme Court had the prosecutors' notes and in *Miller-El* it had the discriminatory practices like jury shuffling. This means that in cases without these practices, it is difficult to establish a *Batson* challenge just based on the reasons the prosecutor gave. There is a litany of acceptable reasons and prosecutors make use of them. Once they do, their peremptories are usually reversal proof. The reasons are not usually scrutinized unless there is some discriminatory practice that suggests that race was part of the jury selection. Without such a practice, however, the reasons tend to be accepted and the *Batson* challenge fails.

Although the Court is justified in taking account of discriminatory practices and scrutinizing prosecutors' reasons carefully when such practices have been used, it is a limited approach because it affords no protection in cases that do not entail discriminatory practices. Even though a single race-based peremptory challenge violates the U.S. Constitution,[192] without the addition of a discriminatory practice, courts will be hard pressed to find a *Batson* violation. In such cases, it will be difficult for a defendant to show that the prosecutor's reasons are pretextual. The African-American prospective juror who is struck by a prosecutor's race-based peremptory challenge in a case in which there are no prosecutors' notes or jury shuffling will be removed from the jury with little recourse. The defendant can raise a *Batson* challenge, but the prosecutor will give a seemingly race-neutral reason and the peremptory will be allowed. Without the telltale discriminatory practice to signal that race might have played a role in the prosecutor's peremptory, the prospective juror will be removed and even an appellate court is unlikely to look further.

The one time that reasons without a discriminatory practice might suffice is when the prosecutor gives a reason for striking an African-American prospective juror but does not apply that reason to a white prospective juror. The Court in *Foster* made use of this approach. For example, the Court was able to find inconsistencies when the prosecutor explained, as one of his reasons for striking Eddie Hood, that Hood's son's

[192] Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016) (quoting Snyder v. Louisiana, 552 U.S. 472, 478 (2008)).

age was close to Foster's age, but the prosecutor accepted white jurors whose sons' ages were close to Foster's age.[193] Similarly, the prosecutor explained that one reason for striking Marilyn Garrett was her young age (thirty-four), even though the prosecutor left on the jury eight white prospective jurors who were under the age of thirty-six.[194] However, the limitation of this approach is that not every case will have black and white prospective jurors who are similarly situated. Thus, in the case in which a prosecutor exercises a peremptory challenge against a black prospective juror because of race, but explains that the strike is because the prospective juror lives in a certain neighborhood, and there is no white prospective juror who also lives in that neighborhood, the peremptory will usually be adjudged race neutral. The Court's careful reading, in which it scrutinizes the prosecutor's reasons for inconsistent application, is useful, but only in certain cases. The Court's approach will not be useful when the venire lacks a white prospective juror with the same characteristic as the black prospective juror who has just been struck.

III. TWEAKING THE *BATSON* TEST

In *Foster*, the Court provided a close reading of the reasons given by the prosecutor and found that they were race based, and thus, in violation of *Batson*.[195] The Court undertook this close reading primarily because Foster had obtained the prosecutors' notes which revealed that the prosecutors had focused on prospective jurors' race throughout jury selection. The notes included a list of "definite NO's" and the five African-American prospective jurors who remained on the venire were on that list.[196] The Court's reading is fact-intensive and of limited utility to lower courts, except insofar as it shows appellate courts that they can engage in this kind of careful reading and review of a prosecutor's reasons, particularly when there are other indicia of discrimination during jury selection, such as prosecutors' notes.

Foster is a straightforward application of *Batson*. It does not call into question the three-step test in *Batson* or consider how the test can be made more effective. This Section takes up the challenge that *Foster* did not address, which is how the test in *Batson* can be made more effective, to the extent it can.

In the past, the Court used several *Batson* challenge cases to clarify the various steps of the three-step *Batson* test. In some cases, such as *Johnson v. California*,[197] the Court's clarification of step one removed a hurdle that

---

[193] *See supra* notes 151–52 and accompanying text.

[194] *Foster*, 136 S. Ct. at 1750.

[195] *Id.* at 1755.

[196] *Id.* at 1744.

[197] 545 U.S. 162, 168–69 (2005) (holding that California's standard, in which an objector to a peremptory challenge "must show that it is more likely than not [that] the other party's peremptory

California had erected before objectors to a peremptory challenge could proceed with a *Batson* challenge. In other cases, such as *Purkett v. Elem*,[198] the Court's clarification of reasons needed at step two versus step three made it harder for an objector to succeed with a *Batson* challenge. By permitting the proponent of the peremptory to give any reason at all no matter how silly or unrelated to the case, it gave the proponent greater cover when exercising discriminatory peremptories and it gave judges and objectors less useful information to work with when trying to determine whether a peremptory was discriminatory.

Foster highlights the difficulties that a criminal defendant[199] faces at step three of the *Batson* test. What if a prosecutor gives race-neutral reasons in court, but is motivated by race-based reasons that are revealed through his notes? The Court could tweak step three by making it clear that a defendant can obtain information, including the prosecution's notes, through a discovery request that would help to reveal the prosecutor's purposeful discrimination. In doing so, the Court would ensure that defendants can rely on "all possible explanatory factors" and "all relevant circumstances" as *Batson* provided[200] and "all of the circumstances that bear upon the issue of racial animosity" as *Snyder* reinforced.[201] The problem, however, is that prosecutors might respond by no longer taking notes during jury selection, just as they now no longer give race as a reason for exercising a peremptory challenge.

Alternatively, the Court could make explicit that at step three purposeful discrimination can be inferred if the peremptory has a "discriminatory

---

challenges, if unexplained, were based on impermissible group bias" created a higher hurdle for an objector to meet than *Batson*'s standard at step one, which only required an objector to establish a prima facie case based on facts that give "rise to an inference of discriminatory purpose").

[198] 514 U.S. 765, 768–70 (1995) (per curiam) (holding that it is not until step three of the three-step *Batson* test that a trial court determines whether the opponent of a peremptory strike has met his burden of proving purposeful discrimination, and that the reason given by the proponent of the strike at step two can be silly or frivolous as long as it is race neutral). The Court made it easier for the prosecution to defend against a *Batson* challenge by indicating that any reason, no matter how silly, could be given at step two, and it would be up to the judge to decide at step three whether the reason was pretextual or not. The reason had only to be race neutral; it no longer had to be "related to the particular case to be tried," as *Batson* had required. Batson v. Kentucky, 476 U.S. 79, 98 (1986).

[199] Although *Foster* involves a *Batson* challenge that a criminal defendant made to the prosecutors' exercise of peremptories based on race, after the *Batson* progeny, *see supra* notes 4–7, an objector is not limited to a criminal defendant, but includes prosecutors in criminal cases and lawyers in civil cases and expands *Batson* to include peremptories based on any race, gender, or ethnicity. I will refer to the prosecutor, given the facts of *Foster*, but all lawyers' peremptories can be the subject of a *Batson* challenge.

[200] *Batson*, 476 U.S. at 95–97.

[201] Snyder v. Louisiana, 552 U.S. 472, 478 (2008) ("[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.") (citation omitted).

effect" or is based on a "discriminatory practice." The defendant could draw on statistical or historical evidence or the facts of his individual case to show the former, or he could look to ongoing or past practices to show the latter.

A. *Obtaining All Information*

The practical challenge of *Batson* is that it is very difficult for a defendant to show that the prosecutor exercised a peremptory challenge based on race. Once the prosecutor has provided seemingly race-neutral reasons at step two, it remains for the trial judge to decide whether the defendant has established purposeful discrimination on the part of the prosecutor at step three. The problem is that the prosecutor can give race-neutral reasons that are detailed, specific, and reasonable, and can deliver them in court in a credible manner. Once the prosecutor has done this, it basically immunizes his peremptory challenge from further scrutiny by the trial judge. After all, the Court in *Batson* said that a prosecutor's reason for exercising a peremptory did not have to rise to the level of a for cause challenge.[202] Moreover, appellate court judges have indicated that with only a cold, hard transcript before them, they are unwilling to question the factual findings of the trial judge.[203] Indeed, appellate court judges simply follow the guidance provided by *Batson* insofar as the *Batson* Court observed that the trial judge is in the best position to make this step-three determination and that reviewing courts should treat this determination with deference.[204]

Foster makes clear what a difficult and lengthy process it can be for a defendant to try to obtain any information that might undermine a prosecutor's seemingly race-neutral reasons even when the defendant suspects from the beginning that the prosecutor is likely to exercise race-based peremptories. Indeed, the defendant in *Foster* filed an early motion, dated December 11, 1986, in which he sought to preclude the prosecution from using its peremptory challenges to exclude blacks;[205] however, the trial judge denied the motion. During jury selection, the defendant made a *Batson* challenge when the prosecutor struck all four remaining African-American prospective jurors from the venire. The trial judge held a *Batson* hearing at which he denied the defendant's *Batson* challenge.[206] After the defendant was convicted and sentenced to death, the defendant sought to obtain a copy

---

[202] *Batson*, 476 U.S. at 97 ("[W]e emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.").

[203] *See supra* note 191.

[204] *Batson*, 476 U.S. at 98 n.21 (drawing from Title VII sex discrimination cases, the Court noted that "[s]ince the trial judge's findings in the context under consideration here likely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference").

[205] Motion to Preclude the Prosecution from Using Its Peremptory Challenges to Exclude Blacks, in 1 Joint App. at 17, Foster v. Chatman, 136 S. Ct 1737 (2016) (No. 14-8349).

[206] *Batson* Hearing Transcript, *supra* note 33, at 49, 58, 60.

of the prosecution's notes through a Motion for Post-Judgment Discovery.[207] After the judge denied that motion, the defendant filed a Motion for a New Trial, in which he renewed his *Batson* challenge and was able to question the prosecutors in court, but he was still unable to obtain their notes.[208] During the hearing on the Motion for a New Trial, the prosecutors provided many race-neutral reasons to explain their peremptories, and the trial judge issued a very complete and detailed opinion explaining why he found the prosecutor's reasons to be race neutral, specific, and credible.[209]

It was many years later, after the passage of the Georgia Open Records Act in 2002,[210] that Foster was able to obtain the prosecutors' notes. But for the fortuitous passage of this state statute and the persistence of the defendant, the defendant would never have obtained the notes. What about defendants in states that lack such a FOIA-like[211] statute? What recourse do they have? A revised step three that enables defendants to make a discovery request that would give them access to the prosecution's notes, manuals, or other jury selection practices would give them information that is currently unavailable to them. Such information would give defendants a unique window into the motives of prosecutors and assist them in meeting the difficult step-three standard of establishing "purposeful discrimination."

The prosecutors' notes in *Foster* provide a rare window into the prosecution's actual view of African-American jurors in capital cases, even as the prosecutors denied that they had acted based on race or held any race-based views. Indeed, the prosecutors stressed that their reasons were all "race-neutral" and that they were not racists.[212] Sometimes documents or practices, such as the prosecutors' notes in *Foster* or the prosecutors' reliance on jury shuffles in *Miller-El*, provide the only indicia that race is a factor once the prosecutor has given his seemingly race-neutral reasons. In these cases, the actions of the prosecutors, in shuffling the juror cards or in marking down the prospective jurors' race on their juror cards, illustrate the old adage that "actions speak louder than words."

If prosecutors knew that defendants would have easy access to their notes, practices, and office manuals with respect to jury selection, then perhaps they would stop using these mechanisms to engage in

---

[207] Motion for Post-Judgment Discovery, *supra* note 48, at 63.

[208] Transcript of Hearing on Motion for New Trial, *supra* note 29, at 78–79 ("But I just would like, if I take the stand, I would like for defense counsel to be put on notice that I don't want him to have access to my file.") (quoting Prosecutor Lanier).

[209] Order on Motion for New Trial, *supra* note 59, at 143.

[210] *See* GA. CODE ANN. §§ 50-18-70 to 50-18-77 (2002).

[211] Public Information Act of 1966 (commonly known as the Freedom of Information Act (FOIA)), Pub. L. No. 89-487, 80 Stat. 250 (codified at 5 U.S.C. § 552 (2012)).

[212] Transcript of Hearing on Motion for New Trial, *supra* note 29, at 95 ("We're being called racist for doing our jobs.") (quoting Prosecutor Pullen).

discriminatory peremptories. If they did not have these tools, perhaps prosecutors would have to change their behavior. Even if they did not change their behavior completely, it would at least be more difficult to engage in discriminatory peremptories without the requisite tools.

However, even granting discovery requests by either party[213] as part of step three is not a panacea. It is just as likely that prosecutors would simply find other ways of exercising race-based peremptories. For example, if prosecutors knew their notes had to be turned over to the defendant, then they would be likely to take great care not to include race as part of their notes. Just as the prosecutors in *Foster* gave gender as a reason for excluding African-American women from the jury, but would not give that reason today in light of *J.E.B.*,[214] so too would they learn not to take notes indicating the race of the prospective jurors, if notes were readily discoverable after *Foster*.

B. *Inferring Discriminatory Intent from Discriminatory Effect or Practice*

Another way to tweak step three would be for the Court to make explicit that discriminatory intent can be inferred from a "discriminatory effect" or "discriminatory practice." These inferences (which are used in step one to establish a prima facie case) would allow the defendant to focus on the actions the prosecutor had taken or the effects the prosecutor's actions had without having to probe the depths of the prosecutor's psyche to determine what had inspired him or her to take those actions. In the end, however, prosecutors would still be able to work around these tweaks.

1. *Discriminatory Effect*

If the defendant had to show at step three—after he established a prima facie case at step one and after the prosecutor gave seemingly race-neutral reasons at step two—that the prosecutor's exercise of his or her peremptory challenge had a "discriminatory effect" from which discriminatory intent could be inferred, then the defendant would have met his burden for a *Batson* challenge. There are several ways a defendant (or any objector) could do

---

[213] Although the problem of race-based peremptories is most acute for criminal defendants trying to expose the discriminatory peremptories of prosecutors, particularly in death penalty cases in the South when the defendant is an African American and the victim is white, the Equal Protection Clause requires both parties—prosecutor and defendant—to refrain from engaging in discriminatory peremptories. *See, e.g.*, EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14 (2010), http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/3K84-6NH8] [hereinafter EJI REPORT]. As Justice Marshall observed in his concurrence in *Batson*: "Our criminal justice system requires not only freedom from any bias against the accused but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." Batson v. Kentucky, 476 U.S. 79, 107 (1986) (Marshall, J., concurring) (internal citation omitted).

[214] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (holding that gender-based peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment).

this. One way would be if the prosecutor exercised his or her peremptories against all or most of the remaining African-American prospective jurors, then the defendant could establish that the prosecutor had used peremptories in a manner that had a "discriminatory effect." The effect would be discriminatory to the defendant because the defendant would be tried by a jury from which all or most of the prospective jurors of his race (or of a particular race) had been struck. The defendant could rely on the discriminatory effect from the prosecutor's use of peremptories that enabled the prosecutor to create an all-white or almost all-white jury to infer discriminatory intent.

In *Miller-El v. Cockrell*, Justice Kennedy relied on the discriminatory effect of the prosecutor's use of peremptories to strike ten out of eleven African-American prospective jurors from the jury as a backdrop for assessing the prosecutor's reasons.[215] From this nearly all-white jury, the Court could infer discriminatory intent from this discriminatory effect. In addition, as Justice Kennedy noted, "[t]hese numbers, while relevant, are not petitioner's whole case."[216] Although he did not rely wholly upon this effect, it was one of the factors that he took into account in *Miller-El*,[217] and he described it as a backdrop against which to assess whether the prosecutor's reasons were pretextual. The Court could use its next *Batson* challenge case to make this consideration more explicit or to permit the discriminatory effect to satisfy step three without having to parse the prosecutor's reasons. For example, in *Foster*, the prosecutors eliminated all four of the remaining African-American prospective jurors from the jury so that Foster was tried by an all-white jury. Under a revised step three, that would suffice to show that the prosecutor exercised discriminatory peremptories.

The problem with inferring discriminatory intent from "discriminatory effect" at step three is that eventually prosecutors will figure out how many African-American prospective jurors they can strike with peremptories without triggering the "discriminatory effect" standard. For example, it may be that they could strike some but not all remaining African-American prospective jurors without running afoul of the "discriminatory effect" standard. Courts would have to draw a line and prosecutors would then work within that line. Yet, the Court has said that the exercise of even one discriminatory peremptory is a violation of the Equal Protection Clause.[218]

---

[215] Miller-El v. Cockrell, 537 U.S. 322, 331 (2003).

[216] *Id.*

[217] *Id.* at 335 ("It is against this background that we examine whether the petitioner's case should be heard by the Court of Appeals.").

[218] *See, e.g.*, Foster v. Chatman, 136 S. Ct 1737, 1755 (2016) (noting that exercising two peremptory strikes on the basis of race is unconstitutional); *Batson*, 476 U.S. at 95 ("'A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making

A standard that looked to discriminatory effect would not help in the case of the prosecutor exercising one discriminatory peremptory because one peremptory would probably not be sufficient to show a discriminatory effect even though the Court has said that just one discriminatory peremptory is a violation of the Equal Protection Clause.

2. *Discriminatory Practice*

Another way to tweak step three is to infer discriminatory intent from a "discriminatory practice." The defendant would have to show that the prosecutor had engaged in a discriminatory practice, from which he could infer discriminatory motive without having to rely wholly upon the prosecutor's reasons. The defendant could focus on the practices of the prosecutor in his case, or on the practices of the prosecutorial office or the practices in that judicial district or even in that state. This approach would draw from the approaches taken in *Swain*[219] and *Batson*[220] and would make either approach or both approaches available to the defendant.

The Court in *Swain v. Alabama* held that a peremptory challenge exercised on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment, but to prevail the defendant had to show that the prosecutor had exercised discriminatory peremptories in case after case.[221] This was exceedingly difficult for a defendant to show, and it effectively immunized prosecutors' discriminatory peremptories from any challenges at all. The Court in *Batson* finally recognized the "crippling burden of proof" that *Swain* had imposed on defendants.[222] Therefore, the *Batson* Court tried to make the evidentiary requirement less onerous. *Batson* permitted a defendant to show that the prosecutor in his case alone had exercised peremptories on the basis of race.[223] Although the Court in *Batson* attempted to create a less onerous evidentiary burden than *Swain*, the *Batson* test proved difficult for defendants to satisfy. Prosecutors became adept at offering seemingly race-neutral reasons and trial judges found it difficult to discern whether those reasons were race neutral or not.

If step three were tweaked so that the defendant could rely on a "discriminatory practice" to infer discriminatory intent, and he could do it *either* by showing that the prosecutor in his case had engaged in a

---

of other comparable decisions.'") (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977)).

[219] *See* Swain v. Alabama, 380 U.S. 202, 227 (1965) ("But the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time.").

[220] *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986) ("[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.").

[221] *See Swain*, 380 U.S. at 227.

[222] *Batson*, 476 U.S. at 92.

[223] *Id.* at 96.

discriminatory practice, such as the jury shuffling in *Miller-El v. Cockrell*,[224] or by using statistical or historical evidence[225] to show that in case after case, African-American prospective jurors were removed through peremptories by a particular prosecutorial office, or in a particular judicial district, or in a particular state, then the defendant might have a greater chance of satisfying step three than he currently does.

Inferring discriminatory intent from a "discriminatory practice" would be less onerous than establishing intent only through the reasons given by the prosecutor. In addition, the defendant would be able to show a "discriminatory practice" in different ways. He could point to the particular practice of the prosecutor in his case, just as Miller-El did.[226] Or, he could point to practices over time and employ statistical evidence that would establish that the striking of African-American prospective jurors in large enough numbers could not be due just to chance, and that race was the underlying reason. For example, in death penalty cases from one county in Alabama between the years 2005 to 2009, prosecutors used peremptory challenges to remove eighty percent of qualified African-American prospective jurors.[227] The problem with *Batson*'s emphasis on the individual case is that it does not allow for a large enough sample size to use statistical analysis. Numbers can be powerful. Inferring discriminatory intent from a "discriminatory practice" would focus the discussion on the institutional practices that permit a prosecutor to use peremptories in a discriminatory manner, rather than looking only for the motives behind the peremptories, which are exceedingly difficult to uncover.

The problem with a "discriminatory practice," however, is that it still permits prosecutors to exercise discriminatory peremptories, but simply to do so without employing a discriminatory practice. They would have to take care not to use an identifiable "discriminatory practice," such as jury shuffling[228] or venire lists that are color-coded for race.[229] Even if they stopped using these established practices, this does not mean they would stop exercising discriminatory peremptories. The individual prosecutor could still exercise a discriminatory peremptory in an individual case. If the

---

[224] *See* Miller-El v. Cockrell, 537 U.S. 322, 333–34 (2003) (describing "jury shuffling").

[225] *See, e.g.*, *id.* at 334–35 (describing the practice of Dallas County assistant district attorneys from the late 1950s to the early 1960s of systematically excluding African Americans from juries).

[226] *See id.* at 346 ("Even though the practice of jury shuffling might not be denominated as a *Batson* claim because it does not involve a peremptory challenge, the use of the practice here tends to erode the credibility of the prosecution's assertion that race was not a motivating factor in jury selection.").

[227] *See* Henry R. Chalmers, *A Long Way to Go: Report Finds Lingering, Hard-to-Eradicate Discrimination in Jury Selection*, LITIG. NEWS, Fall 2010, at 6, 7; *see also* EJI REPORT, *supra* note 213, at 4.

[228] *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 253 (2005); *Miller-El*, 537 U.S. at 333–34.

[229] *See, e.g.*, Foster v. Chatman, 136 S. Ct 1737, 1744–45 (2016).

prosecutor gave seemingly race-neutral reasons at step two, and if he or she did not use an identifiable discriminatory practice at step three, there would be little that the ordinary defendant could do to challenge the peremptory. It might be that a defendant could make use of statistics, but it would be hard for an individual defendant to collect statistics in other cases. After all, that was the "crippling evidentiary burden" imposed in *Swain* and finally recognized in *Batson*.[230]

The Court in *Miller-El v. Cockrell* moved in the direction of inferring discriminatory intent from discriminatory practices. There were a number of discriminatory practices in *Miller-El* that provided further context for evaluating the prosecutors' reasons. During voir dire, the prosecutors framed questions to African-American prospective jurors differently than they did to white prospective jurors.[231] Similarly, they framed questions about the willingness to impose a minimum sentence for murder differently for African-American prospective jurors than for white prospective jurors.[232] In addition, the prosecutors resorted to jury shuffling whenever African-American prospective jurors moved up to the front of the panel for jury consideration, and the district attorney's office had a history of excluding African-American prospective jurors from the venire, and that practice was passed down from one generation to the next.[233] Justice Kennedy explained that the prosecutors' strikes had to be evaluated in the context of these discriminatory practices: "It is against *this background* that we examine whether petitioner's case should be heard by the Court of Appeals."[234]

The Court in *Foster* did use "discriminatory effects" (striking all four African-American prospective jurors remaining on the venire) and "discriminatory practices" (including a highlighted venire list based on race, circling the race on the questionnaire of African Americans, indicating "B" on juror cards of African Americans, and including their names on a "definite NO's" list) as the backdrop against which the prosecutors' reasons are to be assessed.[235] However, the Court still assessed the prosecutors' reasons.[236] It did find the reasons to be race based after finding inconsistencies.[237] The inconsistencies included reasons that shifted over time and that were given to explain peremptories exercised against African-American prospective jurors but were not used to strike white jurors with similar characteristics. The Court in *Foster* used the prosecutors' notes to shine a light on the prosecutors' reasons, but it still assessed the reasons and

---

[230] Batson v. Kentucky, 476 U.S. 79, 92 (1986).

[231] *See Miller-El*, 537 U.S. at 332–33.

[232] *Id.*

[233] *Id.* at 333–34

[234] *Id.* at 335 (emphasis added).

[235] *See* Foster v. Chatman, 136 S. Ct. 1737, 1744 (2016).

[236] *Id.* at 1754.

[237] *Id.*

found them to be inconsistent, and therefore, pretextual.[238]

The Court could make clear that at step three a prosecutor's reasons need to be reviewed against the backdrop of discriminatory effects or practices. A reason that seems race neutral on the surface should not be found to be race neutral if the prosecutor engaged in discriminatory practices, or practices that had discriminatory effects, during jury selection. The difficulty remains, however, that in the ordinary *Batson* challenge, discriminatory practices might not be present or might not come to light. If the prosecutors' notes in *Foster* had not been turned over to the defendant years later, the prosecution's reasons for its peremptory challenges would not have been questioned.

IV. STRENGTHENING THE REMEDY FOR A *BATSON* VIOLATION

Another way to approach the practical difficulties that *Batson* presents for defendants is to strengthen the remedy for a *Batson* violation so as to deter prosecutors from engaging in discriminatory peremptories. The Court could look to experimentation in states such as North Carolina,[239] which enacted the North Carolina Racial Justice Act of 2009 (RJA).[240] The RJA, though short-lived,[241] included a remedy to deter prosecutors from engaging in discriminatory peremptories and tools that made it easier for capital case defendants to succeed with *Batson* challenges.

A. *Taking Death Off the Table*

One way that the RJA tried to deter race-based peremptory challenges by prosecutors in North Carolina was by providing that the remedy for a *Batson* violation in a death penalty case would be life imprisonment without the possibility of parole rather than death.[242] In *Batson*, the Supreme Court

---

[238] *Id.*

[239] Justice Brandeis suggested this approach when he wrote: "[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[240] 2009 N.C. Sess. Laws § 15A-2011(b)(2) (codified as amended at N.C. GEN. STAT. § 15A-2011(b)(2)(2012)) (repealed 2013).

[241] The RJA was amended in 2012. 2012 N.C. Sess. Laws 136 § 15A-2011(c). The amendment reduced the geographic scope of the statistical evidence. The 2009 RJA permitted use of statistical evidence from the county, prosecutorial district, Superior Court division, or the state at the time of trial, whereas the 2012 amendment limited the statistical evidence to "the county or prosecutorial district where the defendant was sentenced to death." N.C. GEN. STAT. § 15A-2011(d) (2012). The RJA was repealed by S.L. 2013-154, § 5(a) (2013).

[242] *See* N.C. GEN. STAT. § 15A-2011(g) (2012), *repealed by* N.C. S.L. 2013-154, § 5(a) (2013); *see also* Campbell Robertson, *Judge in North Carolina Voids 3 Death Sentences*, N.Y. TIMES (Dec. 13, 2012), http://www.nytimes.com/2012/12/14/us/citing-race-north-carolina-judge-voids-death-

instructed lower courts, according to its three-step test, that if a defendant establishes a prima facie case of discrimination (step one), and the prosecutor offers race-neutral reasons (step two), then the judge must decide whether the defendant has met his burden of showing purposeful discrimination (step three).[243] If the trial judge finds that the defendant has met his burden, then the trial court will have to decide on an appropriate remedy. The *Batson* Court, in a footnote that constituted its only discussion of the appropriate remedy,[244] said that it would "make no attempt to instruct these courts how best to implement our holding today."[245] In the same footnote, it suggested two possibilities—reinstate the improperly excluded juror or discharge the entire venire and select a petit jury from a new one—but it "express[ed] no view" as to which of these remedies a lower court should impose.[246] These two remedies could well be seen as establishing a floor, but not a ceiling for the appropriate remedy when there is a finding of a *Batson* violation.[247] According to one commentator,[248] when *Batson* remedies are interpreted through the lens of *Danforth v. Minnesota*,[249] states must provide a remedy that corrects for the constitutional violation, but they are free to provide even greater protection for their citizens by providing a more stringent remedy than the Court had suggested, if they so choose.[250] Such an understanding could leave states free to opt for stronger sanctions in appropriate cases.

Consistent with this view, the RJA provided a strong sanction for a *Batson* violation: it took death off the table. It allowed defendants to challenge their jury selection and sentence, and if they could show that race was a "significant factor," then their death sentence would be reduced to life

---

sentences.html [https://perma.cc/3LYH-SSHQ] ("The Racial Justice Act allows death row inmates to seek to have their sentences changed to life without parole if they can show that race was 'a significant factor' in sentencing.").

[243] *See* Batson v. Kentucky, 476 U.S. 79, 96–98 (1986).

[244] *See* Jason Mazzone, Batson *Remedies,* 97 IOWA L. REV. 1613, 1617 (2012) ("The *Batson* Court addressed remedies for the constitutional violation it identified in just one place in its opinion, in footnote twenty-four.").

[245] *Batson*, 476 U.S. at 99 n.24; *see* O'Brien & Grosso, *supra* note 9, at 1635 (noting that *Batson* did not provide a specific remedy).

[246] *Batson*, 476 U.S. at 99 n.24.

[247] Mazzone, *supra* note 244, at 1629.

[248] *Id.* at 1628–29.

[249] Danforth v. Minnesota, 552 U.S. 264 (2008).

[250] In *Danforth v. Minnesota,* Justice Stevens, writing for the Court, explained: "[T]he remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" *Danforth*, 552 U.S. at 288 (quoting Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 178–79 (1990) (plurality opinion)). Although *Danforth* involved the retroactivity standard for a new rule, and not peremptory challenges, the case makes clear that state courts—though they cannot set standards for "determining *whether* a federal constitutional violation had occurred"—can "provide a remedy beyond that available in federal court." Mazzone, *supra* note 244, at 1628.

without parole or they would have death removed as a potential punishment.[251]

In the *Batson* hearing in *Foster*, the prosecutors made clear that they were focused on the death penalty. As they selected jurors, they kept in mind that they sought the death penalty and they wanted jurors who were willing to apply the death penalty. As one prosecutor explained: "So my whole objective in striking eighty percent women and two men were their views on death penalty and their relationship to their environment and the defendant."[252] If prosecutors are focused on securing the death penalty in particular cases, and if the death penalty can be lost through race-based jury selection, then prosecutors have a powerful incentive to avoid engaging in race-based jury selection in death penalty cases.

In the first application of the RJA, the North Carolina court found that race was a significant factor in the prosecutor's exercise of peremptory challenges.[253] The defendant, Marcus Robinson, was resentenced to life imprisonment without parole.[254] Three other defendants who challenged the jury selection and sentencing in their cases also had their death sentences vacated.[255] The message to prosecutors was a powerful one: if prosecutors engaged in race-based jury selection to ensure the death penalty in particular cases, they would find their efforts thwarted. Thus, the RJA provided an incentive for prosecutors to forgo discriminatory peremptories in capital cases.

Although the RJA was only in effect for about four years,[256] one academic study of the first seven cases brought under the statute found that "while black eligible venire members were struck consistently more than those of other races, this disparity was significantly less after the passage of the RJA."[257] The authors found that this pattern held true for white defendants, but not for black defendants.[258] When prosecutors faced black defendants, they continued to strike black prospective jurors at an even

---

[251] *See* N.C. GEN. STAT. § 15A-2011(g) (2012).

[252] *Batson* Hearing Transcript, *supra* note 33, at 57.

[253] O'Brien & Grosso, *supra* note 9, at 1635.

[254] Order Granting Motion for Appropriate Relief at 44–46, 166–67, North Carolina v. Robinson, 367 N.C. 232 (2013) (No. 91 CRS 23143), http://www.aclu.org/files/assets/marcus_robinson_order.pdf [https://perma.cc/TA25-LUTL]. According to one report, the judge "commuted Marcus Robinson's death sentence to life in prison without the possibility of parole after finding that race played a 'persistent, pervasive and distorting role' in jury selection." Michael Hewitt, *Prosecutors Will Learn How to Fight Racial Justice Act*, WINSTON-SALEM J., May 17, 2012, at 2.

[255] O'Brien & Grosso, *supra* note 9, at 1635.

[256] The RJA took effect on August 11, 2009. *See* Press Release, Ctr. for Death Penalty Litig. Inc., NC Racial Justice Act: First Five Death Row Defendants File Motions Citing Strong Evidence of Racial Bias (Aug. 3, 2010). Its repeal took effect on June 19, 2013.

[257] O'Brien & Grosso, *supra* note 9, at 1640.

[258] *Id.* at 1642–43.

higher rate post-RJA than they had pre-RJA.[259] Thus, it is uncertain whether the RJA, had it remained in effect,[260] would have changed prosecutors' behavior over time, though the authors remained optimistic that it would. They suggested that the RJA, by highlighting statistical and other evidence about the peremptory challenge process across cases and over time, would make prosecutors feel more accountable than the *Batson* regime, which tried to make prosecutors feel responsible for their individual peremptory strikes but only made them feel defensive.[261] In addition, the RJA had succeeded in bringing the issue of race and its effects on the criminal justice system to the foreground in North Carolina,[262] and some psychologists have found, at least in mock jury trials, that when race becomes salient, it can reduce racial bias.[263]

B. *Providing Additional Tools*

The other way the RJA tried to eliminate race-based peremptories was by permitting defendants to show that race had been "a significant factor" in jury selection or sentencing, and by allowing them to rely on evidence from their own case, as well as statistical, documentary, or anecdotal evidence drawn from the county, prosecutorial district, Superior Court division, or the state, though the geographical scope was eventually limited to evidence from the county or prosecutorial district.[264] Statistical evidence can show patterns that are not apparent from a single case. For example, the RJA study was able to show a reduction in race-based peremptories in post-RJA cases, even though the effect was most pronounced in cases with white defendants.[265] Indeed, the Supreme Court recognized the roles that "historical evidence," widespread "practices," and "a culture of discrimination" found in some district attorneys' offices played, and explained that these patterns and practices should provide a context for assessing whether reasons given by prosecutors to justify their peremptory strikes were pretextual.[266] Justice Kennedy, writing for the Court in *Miller-El v. Cockrell*, explained: "This evidence, of course, is relevant to the extent it casts doubt on the legitimacy

---

[259] *See id.* at 1643.

[260] *See supra* note 241 (describing the RJA's amendments and repeal).

[261] *See* O'Brien & Grosso, *supra* note 9, at 1644–45.

[262] *Id.* at 1644.

[263] *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1376–78 (2000) [hereinafter Sommers & Ellsworth, *Race in the Courtroom*]; Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 221 (2001) [hereinafter Sommers & Ellsworth, *White Juror Bias*].

[264] *Compare* 2009 N.C. Sess. Laws 464, § 15A–2011(b)(2) (2009) (codified as amended at N.C. GEN. STAT. § 15A–2011(b)(2) (2012)), *with* 2012 N.C. Sess. Laws 136, § 15A–2011(c) (2012).

[265] *See* O'Brien & Grosso, *supra* note 9, at 1653.

[266] Miller-El v. Cockrell, 537 U.S. 322, 346–47 (2003).

of the motives underlying the State's actions in petitioner's case."[267]

Unfortunately, North Carolina's experiment with the RJA—"the only one of its kind in the country"[268]—was limited to just four years. In 2013, the State House of Representatives voted to repeal it, followed by the State Senate.[269] The bill repealing the RJA was signed into law by Governor Pat McCrory, a Republican.[270] The RJA had passed in 2009, at a time when there was a Democrat in the Governor's Office in North Carolina and the state legislature had not been as heavily controlled by Republicans as it was just a few years later.[271] Opponents viewed the RJA as legislation that clogged the courts, denied justice to victims of violent crimes, and tried to end the death penalty in North Carolina,[272] whereas defenders of the RJA regarded it as legislation that allowed the state to "face up to [its] history and [to] make sure it's not repeated."[273]

If the Court were to follow North Carolina's lead and provide a stringent remedy in capital cases involving *Batson* violations, it might deter prosecutors from engaging in race-based peremptory challenges because death would be off the table. Of course, it might not deter bad behavior, as the North Carolina experiment was brief and left open the question whether prosecutors would change their behavior when the defendant was African American.

---

[267] *Id.* at 347.

[268] Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES (June 5, 2013), http://www.nytimes.com/2013/06/06/us/racial-justice-act-repealed-in-north-carolina.html [https://perma.cc/JL43-3W6N]. The Center for Death Penalty Litigation Inc., which also described North Carolina as "the first state to undertake a comprehensive effort to sever the historical ties between race and the death penalty" with passage of the RJA, also noted that Kentucky was "the only other state with similar, but less comprehensive, legislation." *See* Press Release, *supra* note 256.

[269] Mark Binker, *Racial Justice Act Repeal Headed to the Governor*, WRAL (June 12, 2013), http://www.wral.com/racial-justice-act-repeal-headed-to-the-governor/12547009/ [https://perma.cc/F868-QVET]; Laura Leslie, *House Votes to Roll Back Racial Justice Act*, WRAL (June 4, 2013), www.wral.com/house-votes-to-roll-back-racial-justice-act-/12516075/ [https://perma.cc/CJ8J-7XKC].

[270] Matt Smith, *'Racial Justice Act' Repealed in North Carolina*, CNN (June 21, 3013, 3:48 AM), http://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/ [https://perma.cc/7EMA-TGRQ].

[271] *Id.*

[272] *See, e.g.*, Scott Sexton, *Many of the State's DAs Oppose Racial Justice Act*, WINSTON-SALEM J., July 30, 2009, at 1–2 (describing district attorneys' concern that the bill would end the death penalty in N.C.).

[273] Severson, *supra* note 268 (quoting Rep. Rick Glazier, a Democrat).

V. ELIMINATING PEREMPTORY CHALLENGES

Although the Supreme Court could provide specific remedies as a means of curbing *Batson* violations, the most effective remedy, as Justice Marshall suggested thirty years ago, is the elimination of the peremptory challenge.[274] In the thirty years since *Batson*, lawyers have continued to exercise peremptories based upon a prospective juror's race.[275] The *Batson* three-step test has been unable to stop this practice. Moreover, *Batson* has been most ineffective when it matters the most: in capital cases, such as *Foster*, when the defendant's life is at stake.[276]

It is time, after thirty years of *Batson*,[277] to return to Justice Marshall's prescient observation: "The decision [in *Batson*] will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."[278] Thirty years of experience with *Batson* supports the wisdom of his claim. If a discriminatory peremptory is a violation of the Equal Protection Clause, as the Court has said it is,[279] then peremptories, which are part of the American jury tradition, but which are not protected by the Constitution,[280] must give way in light of a constitutional violation. Justice Marshall urged the Court to go further than the test it devised in *Batson* and to "fashion[] a remedy adequate to eliminate that discrimination."[281] Thirty years ago Justice Marshall identified that remedy as the elimination of the peremptory challenge and it is time to heed his words.[282] The Court did not use *Foster* in this way, even though it presented a good opportunity. There

---

[274] *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring).

[275] Gender-based peremptories were not prohibited until 1994 in *J.E.B. See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (holding that gender-based peremptories violate the Equal Protection Clause).

[276] *See, e.g.*, EJI REPORT, *supra* note 213, at 5 ("Racially biased use of peremptory strikes and illegal racial discrimination in jury selection remains widespread, particularly in serious criminal cases and capital cases."); Chalmers, *supra* note 227, at 6, 7 ("In death penalty cases from 2005 to 2009 in one Alabama county, prosecutors used peremptory strikes to remove 80 percent of the qualified African Americans in the jury venires, according to the [EJI] report.").

[277] The Court waited only a little over twenty years from its opinion in *Swain v. Alabama*, 380 U.S. 202 (1965) to its opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986) to revise the evidentiary burden that it had established in *Swain*. Thirty years seems more than an adequate period of time in which to test the *Batson* framework and to conclude that it has failed to eliminate discriminatory peremptory challenges.

[278] *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring).

[279] *Id.* at 84 ("In *Swain v. Alabama*, this Court recognized that a 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violated the Equal Protection Clause.' . . . This principle has been 'consistently and repeatedly' reaffirmed, . . . in numerous decisions of this Court both preceding and following *Swain*. We reaffirm this principle today.") (internal citations omitted).

[280] *Id.* at 91 ("While the Constitution does not confer a right to peremptory challenges, . . . those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury.") (internal citation omitted).

[281] *Id.* at 105.

[282] *Id.* at 102–03.

are few *Batson* challenges that will come as close to having a "smoking gun" as *Foster* did, but there will be others. *Foster* was a missed opportunity, but it will not be the Court's only opportunity to heed Justice Marshall's wise counsel.

A. *Why* Batson *is so Ineffective*

1. *Forged as a Compromise*

Batson was a compromise. It was an effort by the Justices to preserve peremptory challenges while halting discriminatory peremptories. The defining feature of a peremptory is that it allows a lawyer to remove a prospective juror from the venire without giving any reason at all. *Batson* tried to create a test that would allow trial judges to discern which peremptories were discriminatory without requiring lawyers to give reasons for *all* peremptories. If reasons always had to be given, then the peremptory would no longer be a peremptory, but a challenge for cause. The three-step *Batson* test provided a structure to help the trial judge figure out which peremptories would require reasons and then the trial judge would determine which reasons were race neutral and which were discriminatory.[283] The peremptory would be allowed in the former instance but not in the latter.

The compromise assumed that prosecutors would give the actual reasons for their peremptories and that judges would be able to distinguish permissible from impermissible reasons. With the traditional peremptory, lawyers did not have to articulate a reason. The traditional peremptory could be exercised for any reason or no reason at all. However, with *Batson*, prosecutors, when challenged, had to identify reasons and defendants had to establish that the prosecutors' reasons were pretextual. The three-part test satisfied neither defendants nor prosecutors. Prosecutors did not want to give reasons for their peremptories, and defendants found it difficult to prove prosecutors' purposeful discrimination. Trial judges were left in the middle—in the difficult position of having to determine whether prosecutors' reasons were pretextual after they had given seemingly neutral reasons.[284] Thus, *Batson*, like most compromises, satisfied no one. Its twin goals—to maintain peremptories and to eliminate discriminatory peremptories—were laudable, but incompatible.

---

[283] *See supra* notes 111–16.

[284] Chief Justice Burger, writing in dissent in *Batson*, recognized the difficulties that trial judges would face in implementing *Batson*: "I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding. To my mind, however, attention to these 'implementation' questions leads quickly to the conclusion that there is no 'good' way to implement the holding, let alone a 'best' way." *Batson*, 476 U.S. at 131.

2. *Easy to Evade*

One reason the *Batson* test was unable to stop discriminatory peremptories was because it was easy for prosecutors, and later all other lawyers,[285] to give seemingly neutral reasons for the exercise of a peremptory. The reasons, which according to *Batson*,[286] had to be "related to the particular case to be tried,"[287] proved easy to find. They could be just about anything as long as they did not mention race, gender, or ethnicity.[288] Those were the only taboo words, and lawyers quickly learned to avoid them.[289] They might even have believed that they were not relying on these characteristics when they exercised their peremptories. As Justice Marshall observed: "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal."[290] An attorney might even be unaware that he or she holds such biases, which have been described as implicit biases that "operate outside of conscious awareness."[291]

As long as lawyers stayed clear of mentioning race, gender, or ethnicity as reasons for peremptories, trial judges usually accepted the reasons lawyers gave. To show how easy it was to produce seemingly neutral reasons to explain one's peremptories, one Illinois judge compiled a list of reasons that he facetiously entitled "'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'"[292]

Lawyers' reasons for a peremptory became even easier to provide after the Court in *Purkett v. Elem*[293] loosened the standard it had established in *Batson*. In *Batson*, the Court had tried to strike an appropriate balance and had instructed prosecutors that they could not rely on intuition, hunch, or just an assertion as a basis for a peremptory; rather, they had to provide a reason "related to the particular case to be tried,"[294] though the reason did

---

[285] The *Batson* progeny made the *Batson* test applicable to all lawyers (prosecutors and defense attorneys in criminal cases and all attorneys in civil cases). *See supra* notes 4–7 (describing the *Batson* progeny).

[286] *Batson*, 476 U.S. at 79.

[287] *Id.* at 98.

[288] *See supra* notes 4–7 (identifying the *Batson* progeny that expanded the reach of *Batson*).

[289] *United States v. Omoruyi*, 7 F.3d 880 (9th Cir. 1993), offers a good example of lawyers in the process of learning which words to avoid and which ones they could still use. At the time of *Omoruyi*, race was an unacceptable reason for a peremptory, but gender was still permissible. Accordingly, the prosecutor explained that he exercised his peremptory against an African-American female prospective juror because of her gender, not her race. *Id.* at 881.

[290] *Batson*, 476 U.S at 106 (quoting King v. County of Nassau, 581 F. Supp. 493, 502 (E.D.N.Y. 1984) (internal quotation marks omitted)).

[291] Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 152 (2010).

[292] People v. Randall, 671 N.E.2d 60, 65–66 (Ill. App. Ct. 1996).

[293] Purkett v. Elem, 514 U.S. 765, 768–70 (1995).

[294] *Batson*, 476 U.S. at 98.

not have to rise to the level of a for cause challenge.[295] In *Purkett v. Elem*,[296] the Court backed away from the requirement that the reason had to be related to the case. After *Elem*, the reasons could be "silly" or "fanciful," at least at step two of the *Batson* test, and the Court reasoned that if a lawyer gave such silly reasons at step two, then at step three the judge had to consider whether those silly reasons were pretextual.[297] The difficulty is that the reasons simply have to be race neutral; it no longer matters if they are silly or irrelevant. Thus, the lawyer's reasons for striking two African-American prospective jurors in *Elem*, including the way one prospective juror wore his hair ("long curly hair") and the kind of facial hair another sported ("a mustache and goatee type beard") became acceptable reasons even if they had nothing to do with the case.[298] In the past, I have described reason-giving under *Batson* as a "charade" and reason-giving under *Elem* as a "farce."[299] Both standards were sufficiently lax that almost any reason would do.[300] As a result, the integrity of jury selection was undermined.

3. *Difficult to Review*

Another reason that *Batson* was unable to stop discriminatory peremptories was that while trial judges might be in the best position to determine whether a reason is pretextual or not, it remains an impossible task to perform. If trial judges questioned the reasons, they would impugn the integrity of prosecutors and other lawyers. They would essentially be calling them liars or racists,[301] and not surprisingly, trial judges were reluctant to do this. Appellate judges, with only a transcript before them, had to defer to trial judges' factual and credibility findings. Prosecutors gave seemingly neutral reasons and trial judges accepted them. Appellate judges, who were not in the courtroom and did not see the jurors or the attorneys before them, had little choice but to defer to the trial judge's rulings. As the Seventh Circuit explained, it would not disturb such factual findings unless they were "completely outlandish" or there was other evidence that indicated the "falsity" of the findings.[302]

---

[295] *Id.* at 97.

[296] *Elem*, 514 U.S. at 768–69.

[297] *Id.* at 768.

[298] *Id.* at 766 (quoting the prosecutor) (internal quotation marks omitted).

[299] Marder, Batson *Revisited*, *supra* note 9, at 1595.

[300] However, when a lawyer gives one explanation for striking an African-American prospective juror, but does not exercise a strike against a white prospective juror to whom that same reason applies, then a court is more willing to find that the reason is pretextual. *See, e.g.*, Snyder v. Louisiana, 552 U.S. 472, 483–84 (2008).

[301] Transcript of Hearing on Motion for New Trial, *supra* note 29, at 95 (quoting Prosecutor Pullen).

[302] Tinner v. United Ins. Co. of Am., 308 F.3d 697, 703 (7th Cir. 2002) (quoting United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir.), *and modified*, 136 F.3d 1115 (1998)).

With thirty years of *Batson* experience, it is easy to look back and to see that there are many weaknesses inherent in the approach the Court devised in *Batson*. It is easy for prosecutors to provide seemingly neutral reasons and it is hard for defendants to show underlying discriminatory intent. Trial judges are put in the difficult position of trying to judge those reasons and to determine which are pretextual and which are not when most of the reasons appear neutral on the surface. Trial judges have been told to make credibility determinations,[303] but there is a tendency to find lawyers, who are officers of the court and who appear day after day in the courtroom, to be credible. Appellate judges are put in the difficult position of trying to assess what was seen and heard in the courtroom without actually having been there; thus, they defer to the trial judge's determination.

The problems with *Batson* are structural and mere tweaks are unlikely to resolve them, which is why the only adequate remedy is to eliminate the peremptory challenge. We now have thirty years of experience with *Batson* and it is time to acknowledge that *Batson* has not solved the problem of discriminatory peremptories.

B. *Why Discriminatory Peremptories are so Harmful*

The *Batson* Court recognized that discriminatory peremptory challenges harm the defendant, the excluded juror, and the community.[304] A discriminatory peremptory harms the defendant because he is denied a fair trial.[305] As he watches prospective jurors struck from the jury because of their race, he loses faith in the jury that will hear his case and in the entire criminal justice system. A discriminatory peremptory also harms the excluded juror, who is excluded simply because of his race.[306] A discriminatory peremptory conveys a message of inferiority and second-class citizenship to the excluded juror.[307] Finally, a discriminatory peremptory harms the community at large, which begins to question the integrity and fairness of the trial.[308] The Court in *Batson* identified all three of these harms, and later opinions, such as *Powers v. Ohio*,[309] elaborated on the nature of these harms and how they threatened the fairness of the jury trial.[310]

These multiple harms are particularly pronounced in capital cases, such

---

[303] *See, e.g., id.*

[304] Batson v. Kentucky, 476 U.S. 79, 86–87 (1986).

[305] *Id.* at 86.

[306] *Id.* at 87.

[307] *See, e.g.*, EJI REPORT, *supra* note 213, at 28–30 (describing the stigma that prospective African-American prospective jurors felt when they were struck from the jury).

[308] *Batson*, 476 U.S. at 87.

[309] 499 U.S. 400 (1991).

[310] *Id.* at 402.

as *Foster*. Although the peremptory challenge might have been traditionally seen as a protection for the criminal defendant, that has not been the case particularly for African-American defendants in capital cases in the South. In case after case, and *Foster* was no exception as the Court has now recognized, prosecutors use peremptories to keep African Americans from serving on the jury so that African-American defendants are tried by all-white or almost all-white juries.[311] According to a 2010 report by the *Equal Justice Initiative*, from 2005 to 2009, prosecutors in one county in Alabama used peremptory strikes to remove eighty percent of qualified African-American prospective jurors.[312] When prosecutors use their strikes in this manner, the defendant can raise a *Batson* challenge, but the chance of success is slight. That same report found that Tennessee's "appellate courts have never granted *Batson* relief in a criminal case"[313] and that "no criminal defendant has won a *Batson* challenge in [South Carolina] since 1992."[314]

1. *Harms to the Defendant*

When prosecutors use race-based peremptories, particularly in capital cases, they harm defendants in multiple ways. The defendant watches as one prospective African-American juror after another is struck by the prosecutor, until the defendant is left with an all-white jury. The defendant might question not only whether the jury will understand his perspective, but also whether these jurors will be fair and impartial. He might fear that they are biased, and that there are no jurors remaining who will inhibit racial bias from playing a role during deliberations.[315]

Another harm to the defendant is that he will be tried by a jury that has a limited range of perspectives available to it. Not only have prospective jurors been removed for cause if they are unalterably opposed to the death penalty[316]—and this tends to have a disproportionate effect on African

---

[311] EJI REPORT, *supra* note 213, at 5, 14.

[312] *Id.*; Chalmers, *supra* note 227, at 7 (citing EJI REPORT).

[313] EJI REPORT, *supra* note 213, at 19.

[314] *Id.* at 27.

[315] When African Americans are on a jury, they might challenge statements by white jurors that are based on stereotype. Two psychologists have found that the presence of African Americans on a jury leads white jurors to spend more time discussing race and how it might affect the case. *See, e.g.*, Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 263, at 1376; Sommers & Ellsworth, *White Juror Bias*, *supra* note 263, at 220).

[316] A "death qualified" jury is one in which jurors who are staunchly opposed to the death penalty have been removed for cause. If they say they can consider applying the death penalty, then they can be seated as jurors. If they say they could never apply the death penalty, then they will be removed for cause. The Supreme Court has held that death qualification does not violate the fair cross-section requirement of the Sixth Amendment. Lockhart v. McCree, 476 U.S. 162, 176–78 (1986).

Americans[317]—but also African-American prospective jurors have been removed through the prosecutor's use of discriminatory peremptory challenges, thus leaving very few African Americans, if any, on the jury. Although a defendant is not entitled to have a petit jury of any particular mix,[318] he is entitled to have a jury from which prospective jurors have not been struck because of race. In particular, an African-American defendant in a capital case might worry that those who remain on the jury, after death qualification and the prosecutor's exercise of peremptories, are less likely to include jurors who are willing to analyze the government's case carefully.

The defendant also might feel helpless as he watches the prosecutor exercise discriminatory peremptories because he knows there is little he can do to remedy the situation. He can raise a *Batson* challenge, but if he is being tried in a state such as South Carolina, in which *Batson* challenges have not been granted in over twenty years,[319] then he knows that the trial judge will not grant his challenge. Many defendants in such states do not even bother to raise *Batson* challenges, knowing that trial judges never grant them.[320] Even if the defendant raises a *Batson* challenge and preserves it for appeal, the appellate court will treat the trial judge's determination with deference,[321] as will the habeas court. Thus, the defendant can raise a *Batson* challenge and hope that it will eventually be considered by the U.S. Supreme Court, but since the Court hears only a limited number of cases each Term,[322] this hope has little chance of being realized.

The prosecutor's discriminatory peremptory also harms the defendant in another way: it is an act taken by a government official, which casts doubt on the rest of the trial and raises the question whether other official actors—from the judge, to the witnesses, to the jurors—will act in good faith. One of the features of American society under Jim Crow was not just that white citizens treated African Americans as second-class citizens, but also that white officials treated African Americans in this manner.[323] When the

---

[317] *See, e.g.*, Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46 (1984) (finding that death-qualified juries are more likely to exclude women and African Americans).

[318] *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975) ("It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.").

[319] *See, e.g.*, EJI REPORT, *supra* note 213, at 27 (reporting that no criminal defendant has won a *Batson* challenge in South Carolina since 1992).

[320] Conversation with Stephen Bright, in Iowa City, Iowa (Oct. 20, 2011) (notes on file with author).

[321] Tennessee is an extreme example. Its appellate courts have "never reversed a criminal conviction because of racial discrimination." EJI REPORT, *supra* note 213, at 22.

[322] For example, the Supreme Court heard seventy-six cases in the 2014 Term. *2014 Term Opinions of the Court*, SUPREME CT. OF THE U.S., http://www.supremecourt.gov/ opinions/slipopinion/14 [https://perma.cc/ST3B-4UAN].

[323] *See, e.g.*, GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA (2012) (recounting the plight of the "Groveland boys," four

sheriff, the prosecutor, and the judge were all suspect, African Americans could not depend on the law to protect them.[324] While the system of Jim Crow has been dismantled and African Americans have secured—at least in theory if not in practice[325]—the full rights of citizenship including jury service, discriminatory peremptories are a vestige of this earlier era. Jim Crow laws and practices once prevented African Americans from enjoying full citizenship including the right to serve as jurors and the right to be tried by juries in which members of their race had not been excluded.[326] However, even after statutes prohibiting African-American men from serving on juries were held to be unconstitutional,[327] as were discriminatory peremptories,[328] that did not mean that African Americans actually served on juries.

Finally, discriminatory peremptories in a capital case, such as *Foster*, pose a grave danger because a defendant's life is at stake. A capital jury makes a judgment not only about guilt or innocence, but also about sentencing. Thus, it is imperative that the jury is selected in a manner that is fair. A prosecutor's discriminatory peremptories make it look like the process is rigged even before the trial has begun. Although prosecutors want to win, they cannot put winning above playing by the rules. They need to choose cases that are strong enough to proceed without having to use discriminatory peremptories to improve their chances.

2. *Harms to Excluded Jurors*

As *Batson* and the *Batson* progeny recognized, discriminatory peremptories harm the excluded jurors, in addition to the defendant.[329] African-American men and all women were originally excluded from jury service. State statutes kept African-American men from serving on juries until 1880 when the Court held in *Strauder v. West Virginia* that such statutes violated the Equal Protection Clause of the Fourteenth

---

African-American young men in Florida who were accused of raping a white woman in 1949; two were murdered even before the case went to trial, a third was murdered while being transferred by the sheriff from one prison to another, and the fourth barely survived that same transfer).

[324] In the case of the Groveland boys, the law not only failed to protect them, but law enforcement took matters into its own hands. According to King's account, the sheriff was responsible for the murder of one young man and the attempted murder of another; however, the sheriff was never brought to justice. *Id.* at 253–57.

[325] *But see infra* notes 346–50 and accompanying text describing racial profiling, police brutality, and unequal sentencing.

[326] *See, e.g.*, Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 894–96 (1994).

[327] Strauder v. West Virginia, 100 U.S. 303, 305 (1880).

[328] *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 203–04 (1965).

[329] *See, e.g.*, *Batson*, 476 U.S. at 87 ("As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.").

Amendment.[330] Women did not uniformly have the right to serve as jurors in federal court until the Civil Rights Act of 1957.[331] Even then, some states, such as Florida[332] and Louisiana,[333] maintained practices, such as affirmative registration, that kept women from actually being called for jury duty. A woman had to take the additional step of going to the courthouse and registering for jury service in order to be called to serve.[334] It was not until 1975, when the Court held in *Taylor v. Louisiana*[335] that affirmative registration for women violated a defendant's Sixth Amendment right to a venire drawn from a fair cross-section of the community, that women could be called to serve in equal numbers as men.[336] Thus, discriminatory peremptories, which keep African-American men and all women from serving on juries, need to be understood in light of a history of exclusion.

Although many citizens who receive a jury summons see it only as an inconvenience to be avoided,[337] many others, especially those who have been historically excluded from jury service, regard it as a badge of full citizenship. They feel pride in receiving a summons and in going down to the courthouse in order to serve as a juror. As one African-American man, Mr. Cox, a sanitation worker, explained:

> [It was] one of the proudest moments of my life. Ever since I was a little kid . . . I've had a desire to serve. . . . I've read many books on the jury and when I was first called to serve I went to the library and read up on the jury system and what a fine institution it is. . . . When I got my summons . . . I got a

---

[330] *Strauder*, 100 U.S. at 305, 312.

[331] Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in relevant part at 28 U.S.C. § 1861 (2012)). Different states permitted women to serve as jurors at different points. If a state permitted women to serve in state court as jurors, then they were also permitted to serve in federal court in that state. For an account of early state practices with respect to women and African-American men as jurors, see Nancy S. Marder, *The Changing Composition of the American Jury*, *in* THEN & NOW: STORIES OF LAW AND PROGRESS 66–74 (Lori Andrews & Sarah Harding eds., 2013).

[332] *See* Hoyt v. Florida, 368 U.S. 57, 65 (1961) (holding that Florida's practice of requiring affirmative registration for women who wanted to be called for jury service did not violate the Fourteenth Amendment).

[333] Louisiana was one of the last states to maintain the practice of affirmative registration. The U.S. Supreme Court held the practice unconstitutional in 1975. Taylor v. Louisiana, 419 U.S. 522, 525 (1975). The Louisiana legislature had already repealed the provision on January 1, 1975, but that did not affect Taylor's conviction. *Id.* at 523 n.2.

[334] *Hoyt*, 368 U.S. at 60–61.

[335] 419 U.S. at 522.

[336] *Id.* at 525.

[337] *See, e.g.*, ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS ix–x (1998) (identifying reasons why citizens did not respond to their jury summons and suggesting reforms that would make them more inclined to respond); Susan Carol Losh et al., *"Reluctant Jurors": What Summons Responses Reveal About Jury Duty Attitudes*, 83 JUDICATURE 304, 310 (2000) (finding that citizens who can reschedule their jury duty for a convenient time feel more enthusiastic about their service than citizens who appear when they are told to appear; the most dissatisfied citizens are those who sought an excuse but were denied one).

sense of really belonging to the American community.[338]

Against this backdrop, discriminatory peremptories are an affront to the African-American man or to any woman who has been called to serve but who is now being kept from service "on account of race"[339] or gender. Whereas the summons serves as a badge of full citizenship, the discriminatory peremptory is a reminder that African-American men and all women were once second-class citizens and that they have not fully overcome that inferior status. The lawyer who exercises a discriminatory strike is judging them to be unsuitable for the particular case, not on the basis of any individual characteristic, but solely on the grounds of group membership.

The visibility of race and gender, unlike many other characteristics, means that everyone in the courtroom is aware that the excluded juror is being struck because of race or gender. For example, when one African American after another is struck by a lawyer exercising a peremptory challenge, it is clear to those in the courtroom that these prospective jurors are being removed because of their race. Even if all the peremptory strikes are exercised at once, rather than one at a time, as was the case in *Foster*, it is still apparent when an all-white jury is seated that the prosecutor has used his peremptories to remove all of the African-American prospective jurors because of their race.

A juror excluded by a discriminatory peremptory is likely to experience a range of feelings and they are likely to be negative ones. He might feel stigmatized that he is being judged deficient because of his race, or angry that he is still not being treated as a full citizen, or annoyed that he has been summoned to the courthouse and has taken time away from work only to find that his race is being used against him. Mr. Cox described how he felt as follows: "I was excused seemingly just because my skin was black. There was no other reason why I should have been challenged. I was very irritated and extremely disappointed that such a practice should be allowed."[340]

Typically, judges explain that peremptories are part of the selection process and that they do not mean that the prospective juror cannot serve but only that they cannot serve in that particular case.[341] Judges also tell excluded jurors not to take their exclusion personally, and most try to follow

---

[338] Dale W. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 26. For more recent accounts of the harm suffered by excluded jurors, see EJI REPORT, *supra* note 213, at 28–34.

[339] Batson v. Kentucky, 476 U.S. 79, 97 (1986) (describing the "core guarantee of equal protection" as "ensuring citizens that their State will not discriminate on account of race").

[340] Broeder, *supra* note 338, at 28 (internal quotation marks omitted).

[341] *See, e.g.*, Trial Transcript at 38, United States v. Torres, No. 77 Cr. 680 (S.D.N.Y. May 19, 1980) [hereinafter Trial Transcript] ("If I excuse you, it doesn't mean that I think you are a bad juror . . . .") (quoting Federal District Court Judge Whitman Knapp).

the judge's words.[342] However, it is hard to accept that a discriminatory peremptory is part of the selection process and jurors excluded on this basis are likely to leave the courthouse feeling dissatisfied with their jury experience.

3. *Harms to the Community*

When discriminatory peremptories are used during jury selection, the larger community is likely to question the fairness of the entire trial and the verdict that is ultimately reached. This questioning is likely to be even more pronounced in a capital case when the jury is speaking on behalf of the community and is rendering a judgment and death sentence in the name of the community. For communities to accept a verdict, even when they disagree with it, they have to believe that the process was fair.[343] Discriminatory peremptories call into question the fairness of the process.

A jury trial begins with jury selection. This means that discriminatory peremptories can make the entire trial open to question. The selection of jurors is a critical part of the trial. As Justice Kennedy described the harm to the community in *Powers v. Ohio*: "The composition of the trier of fact itself is called in question, and the irregularity may pervade all the proceedings that follow."[344] If peremptories are exercised in a discriminatory manner, then it appears that the deck is being stacked against the defendant. The jury in a criminal trial stands as a buffer between the individual defendant and the powerful government, including the "corrupt or overzealous prosecutor" or the "compliant, biased, or eccentric judge";[345] it will be unable to play this key role if it is compromised from the start.

When a community is already distrustful of the criminal justice system, discriminatory peremptories only add to that distrust. If a community includes African Americans, and yet discriminatory peremptories are used by the prosecutor to strike the few African-American prospective jurors from the venire, leaving an all-white jury, it will be hard for African Americans in that community to accept that the process was fair and that the verdict is legitimate. Instead, the practice contributes to widespread skepticism about the fairness of the criminal justice system.

C. *Envisioning Jury Selection Without Peremptory Challenges*

If peremptory challenges were eliminated it would eliminate one

---

[342] *See* Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge*, 78 CHI-KENT L. REV. 1061, 1097 (2003) ("Jurors seemed to realize that jury selection is only partly about them.").

[343] Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 119–20 (2000).

[344] Powers v. Ohio, 499 U.S. 400, 412–13 (1991).

[345] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

potential source of discrimination during a trial. Unfortunately, there are many areas of American society that are still marked by discrimination, and the criminal justice system is no exception.[346] There have been longstanding complaints about police practices that include stopping and frisking African-American men far more often than whites[347] and sentencing them to longer prison terms than whites for similar crimes.[348] Headlines have been filled with incidents in which young African-American men have been killed by police,[349] sparking protests around the country.[350] Although there are many

---

[346] *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 690–91 (1995) (describing the criminal justice system as racist).

[347] *See, e.g.*, Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1076 (2010) (calling for rebellious lawyering to root out racial profiling by modern law enforcement).

[348] *See, e.g.*, Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas and Departures on Sentence Outcomes for Drug Offenses 1991–1992*, 31 LAW & SOC'Y REV. 789, 816–17 (1997) (finding that black drug offenders received harsher punishments than similarly situated white defendants in federal court, even when taking into account socioeconomic status, offense severity, criminal history, plea agreements, and sentencing guideline departures); Traci Burch, *Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Sentencing*, 12 J. EMPIRICAL LEGAL STUD. 395, 413 (2015) (finding that "[o]n average, black first-time offenders [in Georgia] receive higher incarceration sentences than whites regardless of crime type . . . [and] blacks of darker skin tones receive longer incarceration sentences than both whites and light-skinned blacks after taking facts about the crime and demographic variables into account").

[349] *See, e.g.*, Mark Berman & Wesley Lowery, *Ferguson Police Say Michael Brown Was a Robbery Suspect, Identify Darren Wilson as Officer Who Shot Him*, WASH. POST (Aug. 15, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/08/15/ferguson-police-releasing-name-of-officer-who-shot-michael-brown/ [https://perma.cc/59NZ-JP7E] (describing the killing of Michael Brown, an unarmed African-American teenager, by police officer Darren Brown); Lilly Fowler, *Community Pours Out to Support Brown Family at Church Rally: Police Shooting in Ferguson*, ST. LOUIS POST-DISPATCH, Aug. 18, 2014, at A6 (describing Rev. Al Sharpton's speech at the Greater Grace Church following the killing of Michael Brown by Darren Wilson, a Ferguson police officer).

[350] *See, e.g.*, Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html [https://perma.cc/P8WV-VEWM] (describing riots in Ferguson, Missouri); David DeBolt et al., *Oakland: Ferguson Protesters Storm Freeway, Loot Stores and Battle Cops*, SAN JOSE MERCURY NEWS (Nov. 25, 2014, 11:38 AM), http://www.mercurynews.com/2014/11/25/oakland-ferguson-protesters-storm-freeway-loot-stores-and-battle-cops/ [https://perma.cc/U5ZS-ALYZ] (describing protesters marching through Oakland, Calif., after a grand jury in Ferguson, Missouri decided not to indict Darren Wilson in the shooting death of Michael Brown); *Ferguson One Year Later: The People, Places and Ideas That Came to Prominence Over the Past Year*, ST. LOUIS POST-DISPATCH, Aug. 9, 2015, at A1 (describing how Trayvon Martin's death in 2012 led to the hashtag "Black Lives Matter" and that after Michael Brown's death it "became the rallying cry for fundamental changes in race relations in this country. The three words were shouted during protests and marches in Ferguson and after police-involved shootings that followed across the country."); David Hunn et al., *No Charges for Wilson. Arson, Rioting Erupt in Ferguson: Ferguson Decision: Federal Inquiries Continue*, ST. LOUIS POST-DISPATCH, Nov. 25, 2014, at A1 (describing protests in Missouri after the announcement that police officer Darren Wilson will not be charged in the shooting death of Michael Brown).

ways in which the criminal justice system is in need of reform, if peremptory challenges were eliminated, there would be one less way that discrimination could enter a trial.

1. *How Would It Work?*

Jury selection without peremptory challenges would follow many of the familiar steps, though it is likely to be quicker and more focused than our current jury selection. A venire would still be brought into the courtroom. Those prospective jurors who sought to be excused for hardship would still be permitted to do so.[351] A venire could be questioned as a whole, or twelve jurors could be seated in the jury box, questioned, and replaced as needed, depending on the practice of the court.

There would still be a voir dire, or questioning, of prospective jurors. The voir dire might even be more extensive than the current practice, at least in federal court, to allow lawyers and judges to identify prospective jurors who should be removed for cause. However, the questioning would focus on which prospective jurors need to be removed for cause. The voir dire would also continue to educate prospective jurors about their role as jurors and help them to make the transition from "reluctant citizens" to "responsible jurors."[352]

Even in a system without peremptory challenges, for cause challenges would continue to be granted; however, there are limited bases for such challenges. Traditionally, for cause challenges are limited to prospective jurors who have a familial connection to one of the participants in the trial, who have a financial stake in the outcome of the trial, or who say that they cannot be impartial.[353] For cause challenges require that a reason is given, that the reason is on the record, and that the judge decides whether the reason fits into one of the limited categories appropriate for a for cause challenge. If the venire is questioned as a whole, then after any prospective jurors who need to be removed for cause have been removed, the bailiff would randomly draw twelve names from the remaining prospective jurors and they would serve as jurors.

Without peremptory challenges, it would be more difficult for the parties

---

[351] *See, e.g.*, Trial Transcript, *supra* note 341, at 47 ("[I]f any of you find [jury duty] unduly burdensome to be as we call it sequestered, when your name is called just come up to me and tell me what particular problem you have and I will see whether in my conscience I should let you go . . . .") (quoting Judge Knapp).

[352] Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI.-KENT L. REV. 927, 929 (2015); *see id.* at 939–42 (describing the transformation of citizens into jurors).

[353] *See* Hopt v. Utah, 120 U.S. 430, 433 (1887). Judges might choose to grant more for cause challenges once peremptory challenges are eliminated because they will not have the lawyers' peremptory challenges to fall back on as they do now. However, for cause challenges will not cause the same problems as peremptory challenges because they are available in only a limited number of circumstances and a reason must always be given in open court and accepted by the judge.

to discriminate against prospective jurors. Peremptory challenges open the door to discrimination, and without peremptory challenges, that door would remain closed. Jurors would be randomly selected from among the prospective jurors who had remained after hardship excuses and for cause challenges had been granted.

The jury that is seated without peremptory challenges is also more likely to be diverse than a jury whose composition has been skewed by peremptory challenges. England and Wales eliminated peremptory challenges and limited stand-bys[354] so that their juries would reflect the heterogeneity of their society.[355] Both countries eliminated peremptory challenges,[356] even though they had long been part of their jury system. According to one empirical study undertaken at the request of the Ministry of Justice, juries in several locations still remain disproportionately white, though those surveyed felt that the verdicts did not discriminate against blacks and other minority defendants.[357] A two-week study providing a snapshot view of juries at the Old Bailey noted that the observed juries were diverse and that jury selection was conducted far more quickly than in the United States.[358]

2. *Judges Have Begun to Contemplate the Possibility of No Peremptory Challenges*

Although peremptory challenges have always been part of the American jury tradition, as they once were in England and Wales, some American judges and Justices have become more open to the possibility of eliminating them. The number of judges, though still small, is growing. Linda Greenhouse, who covered the Supreme Court for *The New York Times* for almost thirty years, noted this trend and observed that "[i]t only takes a

---

[354] Stand-bys allowed the Crown to reserve judgment on a prospective juror until all other prospective jurors were considered. *See* John F. McEldowney, *"Stand by for the Crown": An Historical Analysis*, 1979 CRIM. L. REV. 272, 280–81.

[355] *See, e.g.*, Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1345 (2007) ("'A jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues the corporate good sense of that community.'") (quoting the 1965 Report of the Departmental Committee on Jury Service in the United Kingdom); McEldowney, *supra* note 354, at 282 (arguing that the need for representative juries increases "[a]s English society becomes more heterogeneous").

[356] *See* Criminal Justice Act, 1988, c. 33, § 118(1) (Eng. & Wales). The Criminal Justice Act of 1988 took effect on January 5, 1989. *Id.*

[357] CHERYL THOMAS, ARE JURIES FAIR? i–ii, 45 (2010), https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf [https://perma.cc/7X6S-5AYC].

[358] Nancy S. Marder, *Two Weeks at the Old Bailey: Jury Lessons from England*, 86 CHI.-KENT L. REV. 537, 552–53 (2011).

Supreme Court justice or two to jump-start a public conversation."[359] She had initially raised the question whether *Foster* "[m]ight . . . provide such an occasion."[360] Although the Court missed the opportunity to take up that question in *Foster*, there will be other opportunities and the question remains germane.

Justice Marshall began this public conversation thirty years ago in his concurrence in *Batson* and other Justices and judges have since joined him.[361] On the Supreme Court, Justice Breyer observed that "a jury system without peremptories is no longer unthinkable."[362] He invited his colleagues to reconsider whether peremptories should be eliminated in order to eliminate discrimination during jury selection. In his concurrence in *Miller-El v. Dretke*, he wrote: "This case suggests the need to confront that choice."[363] He ended his concurrence by suggesting that it is "necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole."[364] Justice Stevens, while he was still on the Court, began to consider whether peremptories should be eliminated.[365] As a trial lawyer, he had viewed them as "an inalienable right," but as a judge, he began to see that they "produce minimal benefits at best" and involve "significant cost[s]."[366] This led him to observe: "A citizen should not be denied the opportunity to serve as a juror unless an impartial judge can state an acceptable reason for the denial. A challenge for cause provides such a reason; a peremptory challenge does not."[367] Justice Kennedy broached the question indirectly when he noted in *Edmonson v. Leesville Concrete Co.*[368] that "if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution."[369]

Trial judges, who are in the trenches, have begun to question the practice of peremptory challenges, and a few even banished them from their own courtrooms. Judge Constance Baker Motley, when she was a federal district court judge in the Southern District of New York, took seriously Justice

---

[359] Linda Greenhouse, *The Supreme Court's Gap on Race and Juries*, N.Y. TIMES (Aug. 6, 2015), http://www.nytimes.com/2015/08/06/opinion/the-supreme-courts-gap-on-race-and-juries.html?smpr [https://perma.cc/TYR7-FMY7].

[360] *Id.*

[361] *See* Batson v. Kentucky, 476 U.S. 79, 102 (1986) (Marshall, J., concurring).

[362] Miller-El v. Dretke, 545 U.S. 231, 233 (2005) (Breyer, J., concurring); *see* Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) ("I have argued that legal life without peremptories is no longer unthinkable . . . . I continue to believe that we should reconsider *Batson*'s test and the peremptory challenge system as a whole.").

[363] *Dretke*, 545 U.S. at 273.

[364] *Id.*

[365] *E.g.*, John Paul Stevens, *Foreword*, 78 CHI.-KENT L. REV. 907 (2003).

[366] *Id.*

[367] *Id.* at 907–08.

[368] 500 U.S. 614 (1991).

[369] *Id.* at 630.

Marshall's admonition that discrimination during jury selection could not be eliminated unless peremptories were eliminated.[370] In *Minetos v. City University of New York*, she held that peremptory challenges were a per se violation of the Equal Protection Clause and banned them in her courtroom.[371] In addition to Judge Motley, Judge Evelyn Clay, a Cook County Circuit Court Judge, declared in several trials her unwillingness to seat an all-white jury.[372] She moved ahead of *Batson* in her own courtroom. She explained that she thought an all-white jury denied the defendant a jury of his peers and that the government needed to be willing to seat qualified African-American jurors on the jury.[373]

A number of trial judges, while not going as far as Judge Motley's ban or Judge Clay's interpretation of the law, have nonetheless expressed the view that peremptory challenges should be eliminated. Judge Raymond Broderick, when he was a senior federal district court judge in Pennsylvania, wrote an early article entitled *Why the Peremptory Challenge Should Be Abolished.*[374] More recently, Judge Mark Bennett, a federal district court judge in the Northern District of Iowa, joined "Justice Marshall and Justice Breyer's call for banning peremptories entirely as the only means to eliminate lawyers' tendency to strike jurors due to stereotype and bias."[375]

Several state court judges have long taken the view that peremptory challenges should be eliminated. Judge Morris Hoffman, a state court judge in Colorado, was one of the first to come out against peremptory challenges.[376] He was joined by Judge Gregory Mize, now a senior Superior Court judge in Washington, D.C., who also spoke out against them,[377] as did Judge Arthur Burnett. Judge Burnett, now a senior judge on the Superior Court of the District of Columbia, wrote that "peremptory challenges could

---

[370] Minetos v. City Univ. of N.Y., 925 F. Supp. 177, 183 (S.D.N.Y. 1996). Over twenty years ago, Judge Constance Baker Motley wrote that "[t]ime has proven Mr. Justice Marshall correct." *Id.*

[371] *Id.* at 185. Admittedly, Judge Motley had already taken senior status when she held that peremptories were a per se violation of the Equal Protection Clause.

[372] *See* Jeff Coen, *Judge Lays Down Own Law: No All-White Juries: Transcripts Reveal Controversial Stand*, CHI. TRIB. (July 25, 2005), http://articles.chicagotribune.com/2005-07-25/news/0507250165_1_all-white-jury-number-of-peremptory-challenges-transcripts [https://perma.cc/KY87-VXFL].

[373] *Id.*

[374] Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 420 (1992).

[375] Bennett, *supra* note 291, at 167.

[376] *See* Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 810, 850 (1997).

[377] *See* Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, CT. REV., Spring 1999, at 10 ("[U]rg[ing] greater reliance on reason-based, for-cause elimination of biased jurors, rather than on the inherently irrational use of peremptory challenges.").

and should be abolished altogether."[378] Judge Bellacosa, on the Court of Appeals in New York, filed a concurring opinion, joined by Chief Judge Wachtler and Judge Titone, in which he called for the elimination of peremptory challenges because they "have outlived their usefulness and, ironically, appear to be disguising discrimination—not minimizing it, and clearly not eliminating it."[379] He urged the U.S. Supreme Court and the state legislature to take action.[380] In *Commonwealth v. Rodriguez*,[381] and earlier in *Commonwealth v. Maldonado*,[382] Massachusetts Supreme Judicial Court Chief Justice Margaret H. Marshall also "call[ed] for peremptory challenges to be abolished or restricted substantially."[383]

What is significant is that these trial judges, whether in federal or state courts, have presided over numerous jury trials, are familiar with how peremptory challenges work in practice, and have concluded that peremptory challenges should be eliminated. As Judge Hoffman explained: "[W]e see a lot of trials—many more than even the busiest trial lawyer."[384] Their view is entitled to great weight because they are the ones who have had to put *Batson* into effect.[385] They have occupied a ringside seat from which to observe *Batson*'s deficiencies, and they have concluded that jury selection can work well without peremptory challenges. Indeed, their conclusion goes one step further—it is only with the elimination of peremptory challenges that jury selection can work so that prospective jurors can be seated without regard to race, gender, or ethnicity.

3. *Addressing Lawyers' Resistance*

Most trial lawyers continue to view peremptory challenges as an

---

[378] Arthur L. Burnett, Sr., *Abolish Peremptory Challenges: Reform Juries to Promote Impartiality*, CRIM. JUST., Fall 2005, at 26, 27.

[379] People v. Bolling, 591 N.E.2d 1136, 1142 (N.Y. 1992) (Bellacosa, J., concurring).

[380] *See id.* at 1142–43, 1146.

[381] *See* Commonwealth v. Rodriguez, 931 N.E.2d 20, 43 (Mass. 2010) (Marshall, C.J., concurring) (writing separately to address peremptory challenges and arguing "it is time either to abolish them entirely, or to restrict their use substantially"). Justice Francis X. Spina joined Chief Justice Marshall in her concurrence. *See id.*

[382] *See* Commonwealth v. Maldonado, 788 N.E.2d 968, 975 (Mass. 2003) (Marshall, C.J., concurring). Justice Francis X. Spina and now-retired Justice John M. Greaney joined Chief Justice Marshall's concurrence. *See id.*

[383] Phillip Bantz, *Is It Time for Peremptory Challenges in Mass. to Go?*, MASS. LAW. WKLY., Aug. 23, 2010.

[384] Morris B. Hoffman, *Peremptory Challenges: Lawyers Are from Mars, Judges Are from Venus*, 3 GREEN BAG 2d 135, 136 (2000); *see id.* ("When I am on the civil bench I try an average of 15 to 20 jury trials each year. On the criminal bench I try 25 to 30 jury trials each year. That's a lot of trials, and a lot of peremptory challenge questions . . . .").

[385] Chief Justice Burger, writing in dissent in *Batson*, noted that trial judges faced a difficult task; they were the ones who had "to find their way through the morass the Court creates today." Batson v. Kentucky, 476 U.S. 79, 131 (1986) (Burger, C.J., dissenting). He chastised the Court for leaving the trial judges bereft of any guidance. *Id.*

"inalienable right," just as Justice Stevens had when he was a trial lawyer.[386] It might be because the peremptory challenge gives lawyers a sense of control over whom the jurors will be and allows them to remove those about whom they have misgivings even if they cannot articulate why. They might also believe that they can spot unreliable prospective jurors, or "UFO jurors" in Judge Mize's words, whom the judge will still permit on the jury because they do not meet the for cause standard for removal.[387] It might also be because they think that peremptories operate to their strategic advantage and they do not want to relinquish that advantage. Or it might simply be that peremptories have always been part of American jury trials and that they are familiar with them and are reticent to experiment with change. Their view of peremptories might well be: "If it ain't broke, don't fix it."

When lawyers have advocated for changes to improve the jury system, they have usually urged that peremptory challenges remain as they are. When the American Bar Association (ABA) issued its *Principles for Juries and Jury Trials*, it recommended maintaining the peremptory challenge.[388] Principle 11.D simply states that "[p]eremptory challenges should be available to each of the parties."[389] Similarly, when Arizona's jury reform committee issued a report containing fifty-five ways to reform the jury, it maintained the peremptory challenge as is.[390]

Although trial lawyers are typically staunch defenders of the peremptory challenge, some have recognized that while lawyers believe they use the peremptory to their advantage, there is little evidence that they do. As Alan Dershowitz, a law professor and trial lawyer, has recognized: "Lawyers' instincts are often the *least* trustworthy basis on which to pick jurors. All those neat rules of thumb, but no feedback. Ten years of accumulated experiences may be 10 years of being wrong."[391] Trial lawyers might believe

---

[386] Stevens, *supra* note 365, at 907.

[387] Mize, *supra* note 377, at 10. Judge Mize explained that such "UFO jurors" can be more readily identified if the judge conducts an individual voir dire after conducting a general group voir dire. *Id.* at 11–12. An individual voir dire ensures that prospective jurors must respond to questions and cannot remain silent even when questions pertain to them, as they are wont to do during the group voir dire. *Id.*

[388] *See* AM. BAR ASS'N, PRINCIPLES FOR JURIES & JURY TRIALS 13–14 (2005), http://www.uscourts.gov/sites/default/files/aba_principles_for_juries_and_jury_trials_2005.pdf [https://perma.cc/FRE7-XMD6].

[389] *Id.*

[390] *See* ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, at 68–71 (1994); *see also* William H. Carlile, *Arizona Jury Reforms Buck Legal Traditions*, CHRISTIAN SCI. MONITOR (Feb. 22, 1996), http://www.csmonitor.com/1996/0222/22011.html [https://perma.cc/KM6P-MUPL] (noting that Arizona had adopted eighteen of the jury reform committee's fifty-five recommendations).

[391] Morton Hunt, *Putting Juries on the Couch*, N.Y. TIMES (Nov. 28, 1982), http://www.nytimes.com/1982/11/28/magazine/putting-juries-on-the-couch.html?pagewanted=all [https://perma.cc/7H4W-N3TQ] (emphasis added) (internal quotation marks omitted).

that they can discern bias and discover which jurors will be sympathetic to their case, and might believe that this is one of the strengths that they bring to their client's case, but there is little empirical evidence that they can do this. In fact, the evidence suggests that they usually cannot do this. In one mock jury study, for example, prosecutors, defense attorneys, and judges chose to excuse jurors who "were no more or no less likely to convict than those who were acceptable to judges and defense attorneys."[392] In another study, researchers found that trial lawyers relied on certain characteristics to decide which jurors might be biased, but that their use of those characteristics was no more sophisticated than the reasoning used by college sophomores when asked to select jurors.[393]

The tools that trial attorneys have at their disposal to help them decide which jurors to remove with peremptories are limited, so it is not surprising that they have difficulty discerning bias. Voir dire is not well designed to identify bias for a number of reasons: the questioning of prospective jurors takes place in public;[394] they are questioned as a group;[395] the questions are typically asked by the judge rather than the lawyer, at least in federal court;[396] there is pressure on prospective jurors to give socially acceptable responses;[397] and prospective jurors are asked to decide for themselves whether they think they can be impartial, which is difficult for most people to do.[398] Although lawyers believe that they can discern bias, it is unlikely that they can, particularly given the way that voir dire is currently designed.[399]

Lawyers might fear that without peremptory challenges they will run the

---

[392] Norbert L. Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 JUDICATURE 120, 126 (1994).

[393] Paul V. Olczak et al., *Attorneys' Lay Psychology and its Effectiveness in Selecting Jurors: Three Empirical Studies*, 6 J. SOC. BEHAV. & PERSONALITY 431, 442 (1991).

[394] *See, e.g.*, Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1198 (2003) (recommending more frequent use of written questionnaires that elicit information more privately than in open court).

[395] *See, e.g.*, Mize, *supra* note 377, at 11–12 (recommending an individual voir dire in addition to group voir dire to obtain "more full and candid responses" from prospective jurors).

[396] *See, e.g.*, Bennett, *supra* note 291, at 151 (recommending greater "lawyer participation in voir dire, thereby placing the primary onus to detect and address the implicit bias of jurors in the hands of the trial participants best equipped to do so").

[397] *See, e.g.*, Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 CHI.-KENT L. REV. 1143, 1150 (2003) ("Some prospective jurors who hold biases are likely to state that they can be impartial solely because that answer is consistent with socially learned values that people should be impartial, a phenomenon that psychologists call 'socially desirable' responses.").

[398] *See, e.g.*, Regina Schuller & Neil Vidmar, *The Canadian Criminal Jury*, 86 CHI.-KENT L. REV. 497, 522 (2011) ("[P]eople may be unaware of existing biases and often maintain that they are personally fair and egalitarian, with research demonstrating that, while many people do not believe that they themselves are biased against Blacks, there is strong empirical evidence to suggest otherwise.") (internal citation omitted).

[399] *See, e.g.*, Hans & Jehle, *supra* note 394, at 1194–97, 1201 (describing the "features of limited voir dire [that] encourage a lack of candor"); Marder, *supra* note 352, at 936.

risk of having biased jurors on a jury, but what they need to realize is that the jury process educates jurors so that they take their role seriously and try hard to decide the case based on the evidence presented in court. Every step of the jury process—from the jury summons to the jury verdict—provides the court with opportunities to educate jurors as to their proper role. I have described this in other writing as the need to take "a process view of a juror's education."[400] In other words, every judge-jury or court-jury interaction, including the summons, the orientation video, the voir dire, the oath, the jury instructions, and even juror questions, provides an opportunity for the court to educate jurors as to their proper role. This education of a juror, which continues throughout the trial, and which jurors take seriously, enables them to perform their role responsibly and impartially. Although the peremptory challenge might reassure lawyers that they can discern bias and remove partial jurors from their juries, that reassurance is misplaced. Instead, lawyers need to recognize that the trial process educates jurors to perform their role as ably and impartially as possible.

4. *The Supreme Court's Role*

a. In Practice

Given lawyers' commitment to peremptory challenges and many trial judges' acquiescence,[401] peremptory challenges will not be eliminated unless the Supreme Court takes the initiative. Thirty years of experience with *Batson*[402] has shown that *Batson* is not up to the task for which it was designed. Discriminatory peremptories are still prevalent. Justice White, writing a concurrence in *Batson*, explained that he was joining the Court's opinion, even though he had authored *Swain*,[403] because he recognized that after twenty years of *Swain*, "the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread."[404] Thirty years have now elapsed since *Batson*, and the Court should follow Justice White's lead.

Peremptory challenges preserve a system of jury selection that permits discrimination. In *Batson*, the Court held that discriminatory peremptories

---

[400] Nancy S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible?*, 67 SMU L. REV. 617, 649 (2014); *see generally id.* at 649–61 (describing the process view of a juror's education); Marder, Batson *Revisited*, *supra* note 9, at 1601–06 (describing a process theory of educating jurors to be impartial decision-makers).

[401] *See* Hoffman, *supra* note 384, at 140 (describing lawyers' commitment to peremptory challenges and some judges' and academics' openness to the elimination of peremptory challenges).

[402] Batson v. Kentucky, 476 U.S. 79 (1986).

[403] Swain v. Alabama, 380 U.S. 202, 203 (1965).

[404] *Batson*, 476 U.S. at 101 (White, J., concurring).

are a violation of the Equal Protection Clause.[405] The Court had hoped that the three-step test in *Batson* would permit peremptories to continue while putting a halt to discriminatory peremptories;[406] however, discriminatory peremptories persist. After thirty years of experimentation with *Batson*, it is time for the Court to provide a remedy that is adequate to the task. Justice Marshall recognized the need to eliminate peremptory challenges thirty years ago,[407] and it has resonated more recently with several Justices, including Justice Breyer and Justice Kennedy.[408] It has also resonated with a number of lower court judges, who have come to agree with Judge Motley that "[t]ime has proven Mr. Justice Marshall correct."[409] Justice Marshall recognized that "only by banning peremptories entirely can such discrimination be ended."[410] It is time to follow Justice Marshall's lead and to provide an adequate remedy for this constitutional wrong.[411]

If there are not enough Justices who are ready to eliminate peremptory challenges, those who are ready can play a vital role by signaling their readiness in the next *Batson* case. Thirty-three years ago, Justice Stevens wrote a brief opinion "respecting the denial of the petitions for writs of certiorari" in *McCray v. New York*.[412] In their petitions in *McCray*, several criminal defendants claimed that the prosecutor's exercise of peremptory challenges to exclude African Americans from their petit juries violated their right to an impartial jury drawn from a fair cross section of the community,

---

[405] *Id.* at 89. I continue to believe that discriminatory peremptories are also a violation of the Sixth Amendment's right to an impartial jury. Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1125–36 (1995). I am not alone in this view. *See, e.g.*, Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1840 (1993); Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 541–60 (1986); Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 96–97, 137–48 (1996); Tetlow, *supra* note 9, at 1864–65. However, the Court foreclosed this approach in *Holland v. Illinois* and has never looked back. Holland v. Illinois, 493 U.S. 474, 487 (1990). Instead, it has developed a long line of cases in which discriminatory peremptory challenges are a violation of the Equal Protection Clause. *See supra* notes 4–7 (identifying the *Batson* progeny).

[406] *Batson*, 476 U.S. at 99.

[407] *Id.* at 102–03.

[408] *See supra* notes 362–64, 368–69.

[409] Minetos v. City Univ. of N.Y., 925 F. Supp. 177, 183 (S.D.N.Y. 1996); *see, e.g.*, Ray-Simmons v. State, 132 A.3d 275, 290 (Md. 2016) (McDonald, J., dissenting) ("In *Batson* itself, Justice Thurgood Marshall suggested in a concurring opinion that ending discrimination in peremptory strikes would be best achieved by abolishing peremptory strikes altogether. Others have come to the same conclusion.").

[410] *Batson*, 476 U.S. at 108.

[411] Although the Supreme Court can declare that peremptory challenges are unconstitutional because they permit discrimination during jury selection and thus violate the Equal Protection Clause, it would remain for states, Congress, and the federal rules advisory committees to make the necessary revisions to put this change into effect because the number of peremptory challenges that parties have are usually provided by statute and/or rule.

[412] 461 U.S. 961 (1983).

as guaranteed by the Sixth Amendment to the United States Constitution.[413]

In his brief opinion, Justice Stevens explained why he voted to deny the petitions. Even though he thought the issue was important, he thought it wise to let the issue percolate further in the lower courts.[414] Justices Harry A. Blackmun and Lewis F. Powell, Jr. joined Justice Stevens' opinion, and Justices Thurgood Marshall and William J. Brennan, Jr. dissented from the Court's denial of the petitions for writs of certiorari.[415]Justice Stevens' opinion, joined by two other Justices, plus the two dissenters, signaled to potential petitioners that five Justices thought the issue was an important one that the Court should ultimately hear.[416] The opinion also signaled to lower court judges that *Swain* was not written in stone.[417] The Justices need to make clear that *Batson* is open to question, just as Justice Stevens had signaled in *McCray*, and that peremptories are open to challenge, even if the time has not yet come.

b. As Inspiration

Whether it is now or sometime very soon, the Supreme Court needs to eliminate peremptory challenges because of the enduring role that the jury plays in American society and the inspiring role that the American jury plays in other countries, particularly in aspiring democracies. The American jury, as Alexis de Tocqueville observed 180 years ago, serves as a "free school."[418] It teaches citizens to participate in self-governance, which is important in a democracy. It also brings together citizens from all walks of life and has them work on the critical task of resolving disputes in their society. In polls, citizens who have served as jurors usually think highly of the jury and conclude that the jury performed its job responsibly.[419] Some studies suggest that citizens who serve on juries go on to perform other acts of citizenship, such as voting in elections.[420] It is essential that those who

---

[413] *Id.* at 966–67 (Marshall, J., dissenting).

[414] *Id.* at 963–64.

[415] *Id.* at 961.

[416] Carol Lee, *Reminiscences of Justice Stevens by His Law Clerks: Three Memorable Opinions*, 94 JUDICATURE 9, 10 (2010).

[417] E-mail from Carol Lee, Gen. Counsel, Taconic Capital Advisors L.P., to Nancy S. Marder, Professor of Law, IIT Chicago-Kent Coll. of Law (Sept. 21, 2015, 2:49 PM) (on file with author).

[418] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275 (J.P. Mayer ed. & George Lawrence trans., 1969) (1835).

[419] *See, e.g.*, *New Poll Shows Strong Support for Jury System; Incoming ABA President Calls on Americans to Act on Their Beliefs*, AM. B. ASS'N (Aug. 9, 2004), https://americanbarassociation.wordpress.com/2004/08/09/new-poll-shows-strong-support-for-jury-system-incoming-aba-president-calls-on-americans-to-act-on-their-beliefs/ [https://perma.cc/L638-NT8C] (describing the ABA's survey on the jury).

[420] *See, e.g.*, JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 48–49 (2010) (finding that criminal jury

answer their jury summons and go to the courthouse do not encounter discrimination that keeps them from being seated on a jury. It is also essential that jury selection is not marred by discriminatory peremptories so that the parties and the community will respect the jury trial and accept the verdict even if they do not agree with it. Tocqueville recognized that the American jury functions as more than "simply . . . a judicial institution."[421] In fact, for Tocqueville that was "the least important aspect of the matter."[422] Rather, the jury serves "above all, [as] a political institution" and "it is from that point of view that [the American jury] must always be judged."[423] The jury is a political institution not only because it teaches self-governance, but also because it raises ordinary citizens "to 'the judges' bench.'"[424] Juries, along with judges, constitute one of the three branches of government and serve as a check on the other two branches. When any part of the jury process is tainted by discrimination, it threatens more than the legitimacy of the verdict; it threatens to undermine the integrity of the judiciary.

The American jury serves as a political institution not just in the United States, but in other countries as well. Many countries have adopted jury systems or mixed courts that involve lay participation.[425] The American jury serves as a model for countries looking to have citizens play a greater role in their judicial system.[426] Justice Breyer described the value of exchanges among judges from different countries as follows: "There is . . . an open invitation for each judge to consider his or her own system in light of others. The result is a broadening of vision."[427] The same is true for the jury. Some countries, such as Spain, adopted the traditional jury system in criminal cases.[428] Other countries, such as Korea and Japan, have chosen to have

---

trial service increased voting among low-frequency voters); Valerie P. Hans et al., *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 712 (2014) (finding that civil jury trial service increased voting, depending on jury size, unanimity rule, defendant identity, and case type).

[421] TOCQUEVILLE, *supra* note 418, at 272.

[422] *Id.* at 273.

[423] *Id.* at 272.

[424] *Id.* at 272–73.

[425] *See Symposium on Comparative Jury Systems*, 86 CHI.-KENT L. REV. 449 (2011) (providing examples of jury systems in Australia, Canada, England and Wales, Spain, and Russia, and mixed courts in France).

[426] Of course, it is a two-way street. The American jury can benefit from some practices that work well in other countries. *See* Marder, *supra* note 358, at 539 ("Jury practices in another country can suggest new ways to conduct jury trials in one's own country."); *see also id.* at 539–51 (describing other jury practices in England and Wales that would work well in the United States).

[427] STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 270 (2015).

[428] *See, e.g.*, Mar Jimeno-Bulnes, *Jury Selection and Jury Trial in Spain: Between Theory and Practice*, 86 CHI.-KENT L. REV. 585, 600–02 (2011) (explaining that Spain adopted a traditional jury system, but its juries are required to give reasons for their verdicts); Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European*

citizens work with professional judges, to decide certain criminal cases, so that judges or prosecutors do not lose touch with ordinary citizens' views.[429] Other countries, such as Russia, have returned to a traditional jury system, but still struggle to establish a jury that operates independently.[430] For countries that have adopted the traditional jury, and even for countries that have chosen a hybrid system of judges and lay participants, the American jury serves as a model. It is important that American jury selection is free from discrimination so that our own jury system has integrity and so that it can inspire other countries, especially those still struggling to establish democracies with an independent judiciary and jury.

CONCLUSION

Jury selection in Timothy Tyrone Foster's trial was marred by the prosecutors' use of discriminatory peremptory challenges. Although the prosecutors gave seemingly race-neutral reasons for their exercise of four peremptory challenges against four African-American prospective jurors, the prosecutors' notes revealed that their peremptories were motivated by race. The Supreme Court refused to turn a blind eye to the prosecutors' notes; instead, the notes led the Court to examine the prosecutors' reasons with great care. The Court found that the prosecutors had exercised at least two peremptory challenges in violation of *Batson v. Kentucky*.

We have now had thirty years of the *Batson* experiment. There is ample evidence that *Batson*, though well intentioned, has failed to rid jury selection of discriminatory peremptories. Although the Court could consider other alternatives, such as permitting parties to infer discriminatory intent by showing discriminatory effects or discriminatory practices, or by providing more stringent remedies, such as the one followed in North Carolina, in order to deter prosecutors from engaging in discriminatory peremptory challenges in capital cases, in the end these approaches are unlikely to provide an adequate remedy.

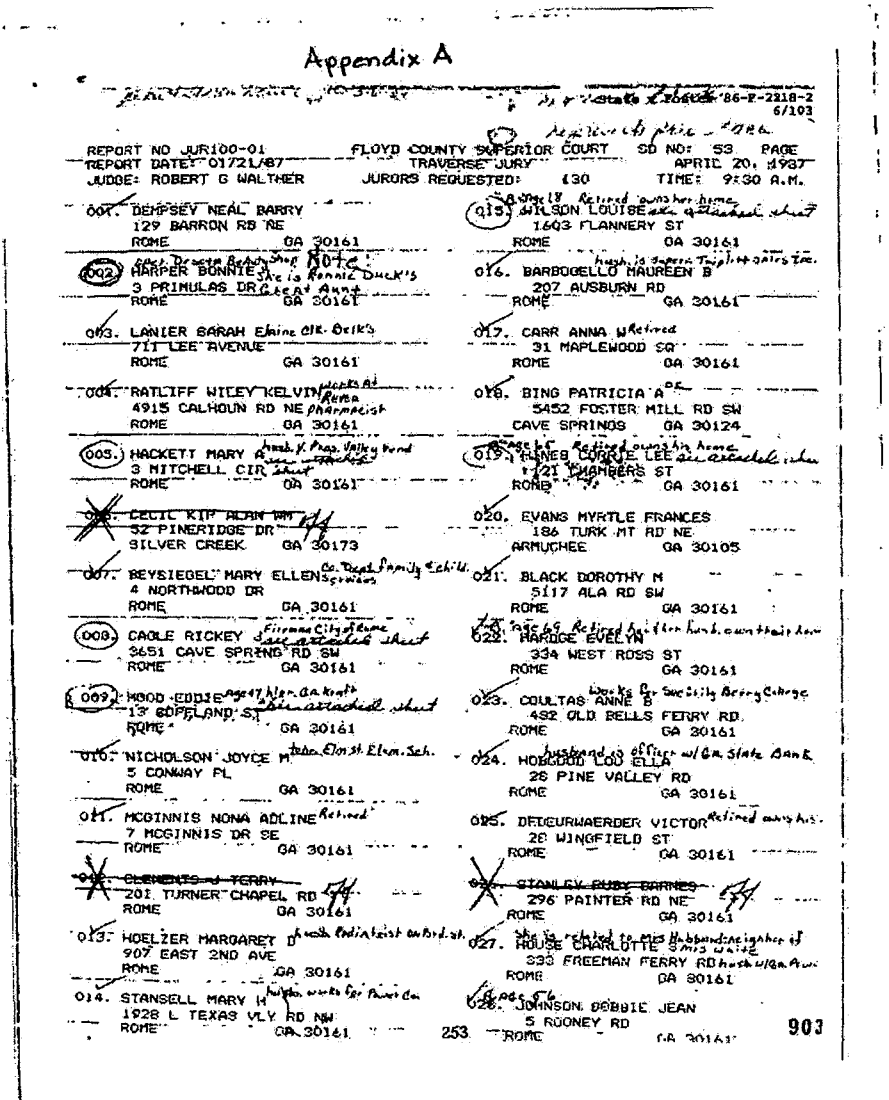
Court of Human Rights Decision in Taxquet v. Belgium, 86 CHI.-KENT L. REV. 613, 628 (2011) (describing Spain's revival of the "classic jury").

[429] *See, e.g.*, Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. 315, 328–29 (2007) (describing how public participation in criminal proceedings may serve as a check on prosecutorial decisions not to prosecute alleged misconduct by public officers or political groups); Jae-Hyup Lee, *Getting Citizens Involved: Civil Participation in Judicial Decision-Making in Korea*, 4 E. ASIA L. REV. 177, 183 (2009) (discussing Korea's introduction of the jury system due to public "[c]oncern over professional judges' dogmatic judgment and their monopoly on fact-finding").

[430] *See* Stephen C. Thaman, *The Good, the Bad, or the Indifferent:* 12 Angry Men *in Russia*, 82 CHI.-KENT L. REV. 791, 808 (2007) (citing a poll in Russia in which "[f]ifty-one percent [of respondents] thought it was tough for juries to be objective in today's conditions, and that it was 'easy to buy or scare' jurors.").

Eventually, the Court will have to recognize that discriminatory peremptories persist and that the only adequate remedy is the elimination of peremptory challenges. Many lawyers and some judges may balk at the loss of a tradition, but it is a tradition that serves as a mask for discrimination and for that reason it is a tradition that we should discard. In its place would be a new tradition: jury selection without the cover for discrimination that peremptory challenges now provide.

APPENDIX A



Appendix A

REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
JUDGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

001. DEMPSEY NEAL BARRY
129 BARRON RD NE
ROME GA 30161

002. HARPER BONNIE J
3 PRIMULAS DR
ROME GA 30161

003. LANIER SARAH Elaine
711 LEE AVENUE
ROME GA 30161

004. RATLIFF WILEY KELVIN
4915 CALHOUN RD NE
ROME GA 30161

005. HACKETT MARY A
3 MITCHELL CIR
ROME GA 30161

006. CECIL KIP ALAN MM
52 PINERIDGE DR
SILVER CREEK GA 30173

007. BEYSIEGEL MARY ELLEN
4 NORTHWOOD DR
ROME GA 30161

008. CAGLE RICKEY
3651 CAVE SPRING RD SW
ROME GA 30161

009. WOOD EDDIE
13 GOPELAND ST
ROME GA 30161

010. NICHOLSON JOYCE M
5 CONWAY PL
ROME GA 30161

011. MCGINNIS NONA ADLINE
7 MCGINNIS DR SE
ROME GA 30161

012. CLEMENTS J TERRY
201 TURNER CHAPEL RD
ROME GA 30161

013. HOELZER MARGARET D
907 EAST 2ND AVE
ROME GA 30161

014. STANSELL MARY H
1928 L TEXAS VLY RD NW
ROME GA 30161

015. WILSON LOUISE
1603 FLANNERY ST
ROME GA 30161

016. BARBOGELLO MAUREEN B
207 AUSBURN RD
ROME GA 30161

017. CARR ANNA W
31 MAPLEWOOD SQ
ROME GA 30161

018. BING PATRICIA A
5452 FOSTER MILL RD SW
CAVE SPRINGS GA 30124

019. HINES CORRIE LEE
1721 CHAMBERS ST
ROME GA 30161

020. EVANS MYRTLE FRANCES
186 TURK MT RD NE
ARMUCHEE GA 30105

021. BLACK DOROTHY M
5117 ALA RD SW
ROME GA 30161

022. HARDGE EVELYN
334 WEST ROSS ST
ROME GA 30161

023. COULTAS ANNE B
492 OLD BELLS FERRY RD
ROME GA 30161

024. HOBGOOD LOU ELLA
28 PINE VALLEY RD
ROME GA 30161

025. DEGEURWAERDER VICTOR
28 WINGFIELD ST
ROME GA 30161

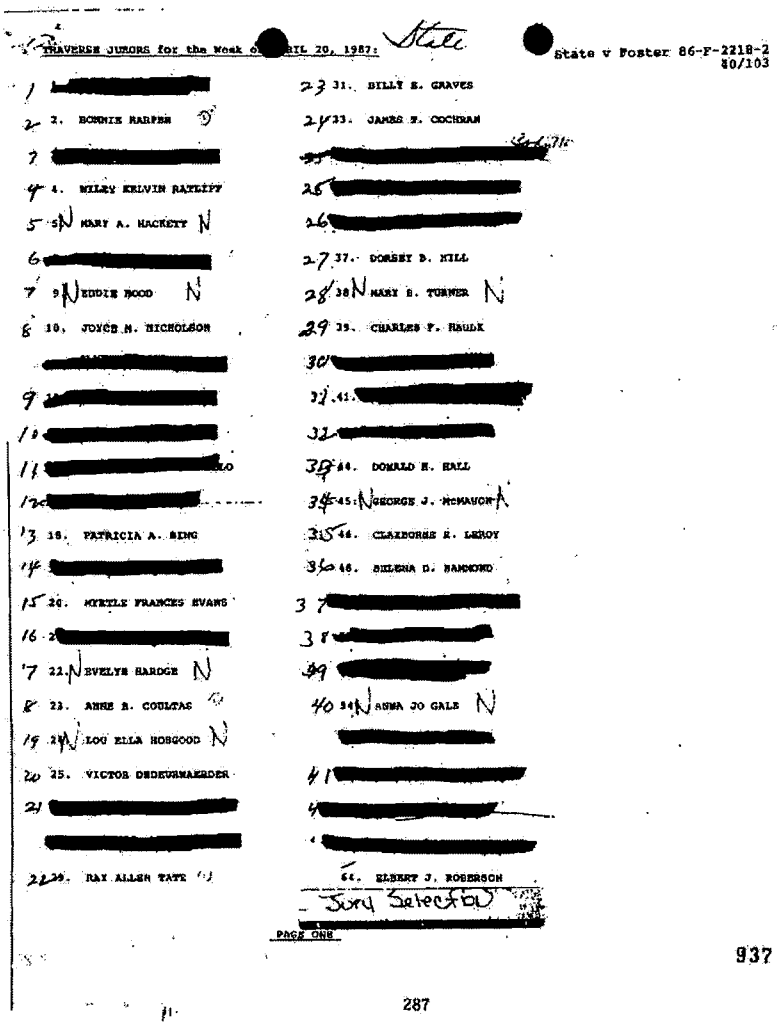
026. STANLEY RUBY BARNES
296 PAINTER RD NE
ROME GA 30161

027. HOUSE CHARLOTTE SMITH
333 FREEMAN FERRY RD
ROME GA 30161

028. JOHNSON DEBBIE JEAN
5 ROONEY RD
ROME GA 30161

253

903



TRAVERSE JURORS for the Week of APRIL 20, 1987: State

State v Foster 86-F-2218-2
80/103

1 [redacted]
2. BONNIE HARPER
3 [redacted]
4. WILEY KELVIN RATLIFF
5 N MARY A. HACKETT N
6 [redacted]
7 N EDDIE HOOD N
10. JOYCE M. NICHOLSON
[redacted]
9 [redacted]
10 [redacted]
11 [redacted] LO
12 [redacted]
13 16. PATRICIA A. KING
14 [redacted]
15 20. MYRTLE FRANCES EVANS
16 [redacted]
17 22. N EVELYN HARDGE N
18 23. ANNE B. COULTAS
19 24 N LOU ELLA HOSGOOD N
20 25. VICTOR DENKMANNDER
21 [redacted]
[redacted]
22 29. RAY ALLEN TATE

23 31. BILLY E. GRAVES
24 33. JAMES F. COCHRAN
[redacted]
26 [redacted]
26 [redacted]
27 37. DORSEY D. HILL
28 38 N MARY B. TURNER N
29 39. CHARLES F. HAUCK
30 [redacted]
31 41. [redacted]
32 [redacted]
33 44. DONALD H. HALL
34 45. N GEORGE J. MCMAHON N
35 46. CLAIBORNE R. LEROY
36 48. SHLENA D. HAMMOND
37 [redacted]
38 [redacted]
39 [redacted]
40 54 N ANNA JO GALE N
[redacted]
41 [redacted]
42 [redacted]
[redacted]
64. ELBERT J. ROBERSON
Jury Selected

PAGE ONE

937

287

B#1

State v Foster 86-F-1218-2
48/103

Eddie Hood

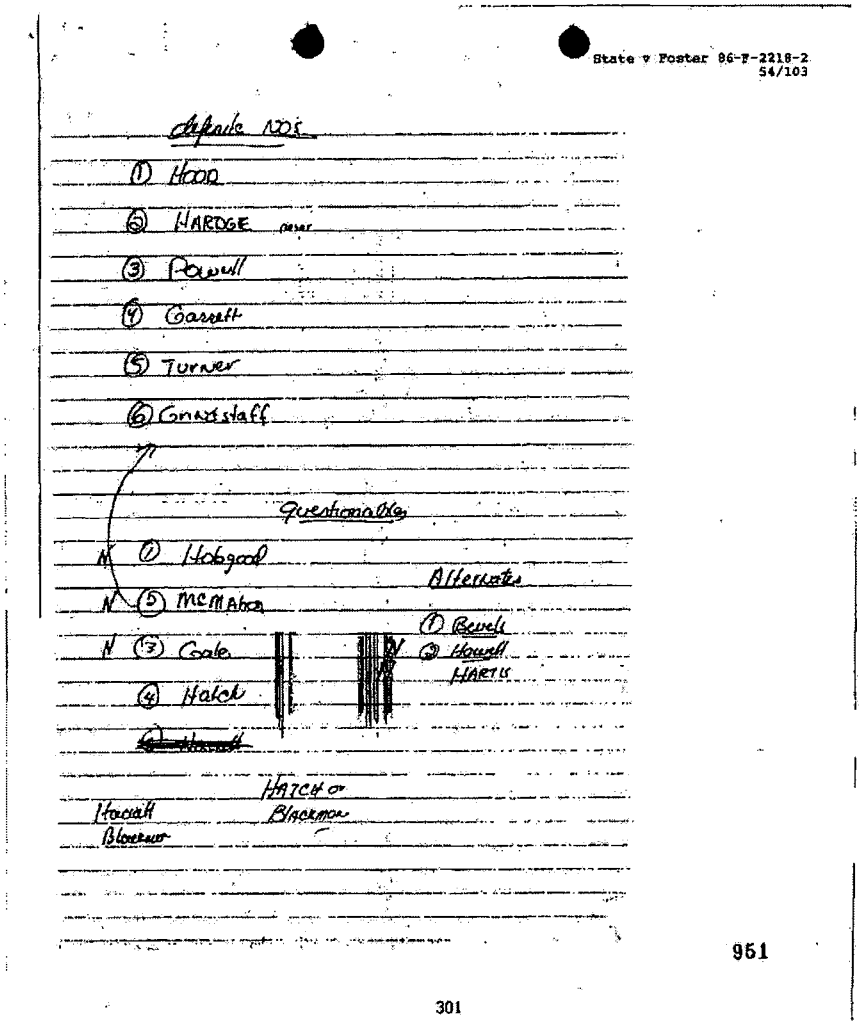
N

hesitated - when asked about DP
(yes) " " " " auto voting for life imprisonment
unsure of use of word automatically -
psychiatric questions - "Never had it" didn't answer question!
discussion w/ co-workers about his trying to escape
one son — 18 yrs old

Work Demands / didn't ask a lot of questions

[illegible]

945


State v Foster 86-F-2218-2
54/103
Defense Uses
(1) Hood
(2) HARDGE never
(3) Powell
(4) Garrett
(5) Turner
(6) Comerstaff
Questionable
N (1) Hobgood
N (5) McMahon
N (3) Gale
(4) Hatch
Alternates
(1) Revels
(2) Howell
HARRIS
HATCH or
BLACKMON
Hocutt
Blackmon
951
301